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No. 7394

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALBERT Z. EDDY, ALBERT P. EDDY, RAYMOND E. EDDY and GLADYS KANE,

Appellants,

vs.

NATIONAL UNION INDEMNITY COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLEE.

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GENERAL STATEMENT OF THE EVIDENCE.

First of all, we wish to refer the court to the findings. These findings should be read as a preliminary to our resumé of the facts.

The defendant, National Union Indemnity Company, was engaged in the automobile insurance business in the City of San Francisco, in the year 1929. It had a general agent by the name of Leo Pockwitz & Co. Upon June 1, 1929, an insurance broker by the name of E. H. Payne applied for full coverage upon a Lincoln automobile owned by Dr. Fred R. Carfagni. The application for this insurance was placed with Leo Pockwitz & Co. as general agent for the defen-

dant. The application was honored by the general agent, which had authority to countersign the policies of the defendant. The policy was issued to the assured and a daily report was sent to the office of the National Union Indemnity Company at San Francisco.

Upon the face of this daily report it appeared that the automobile of the assured had been purchased in October of 1928. There was a discrepancy therefore between the date upon which the automobile was purchased and the effective date of the policy, to-wit: June 1, 1929. One of the assistant underwriters, Mr. Charles Haug, noted this discrepancy and called upon the general agent to inquire as to what the broker who placed the risk had to say about the discrepancy.

The inquiry concerning the discrepancy was made by Mr. Haug to Miss Helen Hearney, in the Automobile Department of the general agent, Leo Pockwitz & Co. Miss Hearney had called Mr. E. H. Payne, the broker, for an explanation. Mr. Payne had told Miss Hearney that the risk was all right "that it had not been cancelled by any other company and that it was in order for me to write it up". (Tr. p. 150.) After verifying this statement and the confirmation by her, Miss Hearney took the word of the broker Payne and reported the conversation to Mr. Haug. After the conversation, Mr. Haug made a blue pencil notation upon the daily report (Plaintiff's Exhibit No. 2) to the effect that "broker says insurance was overlooked, absolutely no claims".

This inquiry related to Declaration 9 of the policy, which was to be used to the effect that no company

has cancelled or refused to issue any kind of automobile insurance for the assured during the three-year period prior to the policy, particularly when there was inserted in the policy the standard phrase "no exceptions".

The first policy of automobile insurance was therefore issued through the agency of Leo Pockwitz & Co. to Dr. Fred R. Carfagni. This policy was delivered to E. H. Payne, the broker. The broker had been engaged in the brokerage business for about twenty-seven years. He had acted as the insurance advisor and broker and general insurance representative of Dr. Fred R. Carfagni for about twelve years. Dr. Carfagni placed the entire management and control of his insurance brokerage business and the selection of risks and the handling of losses and every other matter pertaining to insurance with this particular broker, E. H. Payne.

The first policy expired after one year. A renewal of the policy was made directly between the defendant and the broker. The second policy ran to June 1, 1931. This policy was renewed and a third policy was issued on or about May 13, 1931. All of these policies contained the standard forms of declarations and in each one there were no exceptions to the cancellation or refusal clause. Each of the policies was delivered to the broker, who retained the possession of them for his principal, Dr. Carfagni. Dr. Carfagni at all times had access to the policies which were retained by his broker.

Some minor losses were paid to the assured under the first and second policies. The losses were so minor that renewal was recommended each time. In these losses, Dr. Carfagni was not at fault. However, on or about June 22, 1931, Dr. Carfagni became involved in a very serious accident in which one Mrs. Eddy was killed. This accident was reported to the defendant the following morning after it had occurred. Shortly thereafter, Mr. Jacobus, appellee's Claims Superintendent, met Mr. J. J. Berg, of the Pacific Indemnity Company. They conversed about claims matters in general and Mr. Berg stated that he had witnessed a fatal wreck out near his home. In conversation the name of Dr. Carfagni was mentioned. Mr. Jacobus told Mr. Berg that he was one of the assureds of the defendant. Mr. Berg told Mr. Jacobus that the Old Security Company had cancelled him out as a bad risk. Immediately, Mr. Jacobus proceeded to investigate and caused to be investigated the full background of the assured, and particularly with reference to the history of cancellations.

The investigation conducted by Mr. Jacobus and others disclosed that this particular person had been cancelled out of the Home Accident Company of Arkansas on or about August 15, 1928. He had also been cancelled out by the Travelers Insurance Company on or about September 15, 1928. His policy had also been cancelled out by Western States Company on or about June 11, 1929. These cancellations were called replacements by E. H. Payne, the broker, but upon inquiry from the court he stated that re-

placement and cancellation is the same thing, because when the company elected to cancel the insurance the broker was notified to replace the coverage in some other company. That was the case with most of the cancellations of Dr. Carfagni, except the one case of the Home Accident Company, in which they were required to notify in a formal manner.

Immediately after learning of this information, Mr. Jacobus, upon behalf of the defendant below, rescinded the policy of June 1, 1931, and attempted to tender back the amount owing to Dr. Carfagni under the premium payment made upon that particular policy. Dr. Carfagni prevented the performance of the tender by refusing to accept the registered letter which was sent to him. After this refusal and return of the registered letter, Mr. Jacobus attempted, upon two other occasions, to get the letter into his hands, but was prevented by Dr. Carfagni. Finally the matter was taken up with Messrs. McKenzie & McKenzie, who were the attorneys designated by Dr. Carfagni. The defendant notified the attorneys of Dr. Carfagni that they repudiated all liability and rescinded the contract upon the ground of the breach of warranty upon the part of the assured.

Thereafter, Dr. Carfagni was made a defendant in in the action brought by the heirs of the deceased Mrs. Eddy. All participation in this particular action was refused. The defendant stepped out of the matter entirely after the notice of rescission. Judgment was rendered in that action against Dr. Carfagni; execution, based upon the judgment, was returned unsatis-

fied; the present action was brought under the policy, which was held by the broker Payne for Dr. Carfagni.

The defendant answered the complaint and set forth the breach of warranty No. 9 in the policy to the effect that there were no exceptions to the cancellation or refusal of automobile insurance for the assured during the three years prior to the effective dates of the policy.

With these facts in mind, we shall now proceed to discuss appellants' brief in some detail.

APPELLANTS HAVE MISSTATED THE EVIDENCE, CONFUSED THE ISSUES, AND INCORRECTLY DIGESTED THE AUTHORITIES CITED.

We do not agree with the statement of facts made by appellants. Counsel have forgotten that this appeal is from a judgment based upon findings of fact. Appellants' statement of facts is colored by the injection of argument and by a desire to set forth only evidence which *they* believe to be true. They forget entirely that the trial court has found against them.

Likewise, we cannot accede to appellants' statement of the issues. Here again the findings have been forgotten, the evidence distorted and the issues confused.

Although we propose to reply later in more detail to appellants' brief, a general analysis of that brief at this time will serve as a guide for what is to follow.

The facts as found by the trial court present an entirely different picture from that painted by counsel for appellants.

The statement of issues made by appellants does not contain a correct enumeration of issues for this appeal. Argument and incomplete statements of fact have no place in a statement of issues.

Their elaborate specification of errors for the most part amounts to argument by means of incorrect and incomplete statements from the evidence and by means of erroneous conclusions of law.

On the whole their cases are based upon facts entirely dissimilar to the ones at bar. In many instances the appellants have been guilty of misstating the holding of their cases; and in other instances they have been so careless as to refer us to cases holding in favor of the insurance company upon propositions for which we are here contending. But worst of all, they have tried to anticipate our reply by resort to the well known device of declaring our cases immaterial.

APPELLANTS' STATEMENT OF FACTS IS ERRONEOUS AND IGNORES THE FINDINGS OF THE TRIAL COURT MADE ON CONFLICTING EVIDENCE.

For the convenience of the court, we shall discuss appellants' argument on facts by reference to the page number of appellants' brief, using the abbreviation, (A. Br.).

Appellants say (A. Br. p. 6) the Home Accident Insurance Company policy was cancelled because of a "bad credit report". Finding number III says it was cancelled as a "bad risk". Evidence in support of this finding is to be found at pages 117, 118 (Defendant's "Exhibit B") and at 135 of the transcript.

They state (A. Br. pp. 7-8) that the assured's broker, Payne, made no statement to appellee or its agent concerning prior cancellations. The court found that Mr. Payne *did* make a statement to appellee's agent to the effect that there had been no cancellations. (Finding No. III.) This finding is supported by evidence to be found at the following pages of the transcript: 150, 163, 148. The subsequent renewals were based upon this first representation and Payne knew it. (Tr. pp. 107, 108-109.) The insurance company relied on it in making the subsequent renewals. Payne knew that, too. (Tr. pp. 164, 108.)

At page 10-11 (A. Br.) appellants contend that a custom existed among insurance companies not to inquire about prior cancellations. The actual practice in our case refutes such an argument. The evidence shows good underwriting practice was followed and an inquiry was made of Payne before the policy was written. (Tr. p. 163.)

Mr. Sullivan is mentioned at page 11 (A. Br.) as testifying to the meaning of "no exceptions". He blandly tried to say it means the insurance company lacked further information. However, when the trial court showed astonishment at such contradiction of terms, Mr. Sullivan admitted that it meant just what it said. (Tr. p. 161.)

They rely on the lack of discussion about cancellations on the occasion of the second renewal of the policy in question. (A. Br. pp. 13-14.) However, Payne knew the practice followed; knew the words "no exceptions" would be placed in the third policy;

and read the policy when it was delivered to him. (Tr. pp. 107, 108-109.) After all his trouble getting his principal insured, he wasn't going to tell the appellee anything to jeopardize his chances.

Although wholly immaterial because of the non-waiver provision in the policy, much ado is made about the presence in appellee's files of Credit Clearance Association cards showing two of the many cancellations against the assured. (A. Br. pp. 15-20.) Although this evidence supports the trial court's finding of constructive knowledge to the assured about two cancellations, it is of little value in view of Payne's representations to the company that there had been no cancellations. They are also of no import because they fail to reveal the other cancellations; and because their mere presence cannot be used to predicate a claim of waiver. A search by appellee among its files was rendered unnecessary and it can be presumed that it did not make search. There was no *actual knowledge* shown on the part of anyone connected with the appellee. Mr. Arnberger of the National Union never saw the two cards of the Credit Association (Tr. p. 217), although appellants would infer that he did. (A. Br. p. 20.)

They rely (A. Br. p. 22) on the repair order by a representative of appellee as constituting a recognition of the continued effect of the policy. They failed to prove either knowledge or authority in the representative who directed the car sent to Larkin & Co.

THE SPECIFICATION OF ERRORS BY APPELLANTS IS FULL OF INACCURATE REFERENCES TO THE EVIDENCE AND OF SPECIOUS ARGUMENT.

Appellants have tried to argue this case under the guise of specifying errors. They make inaccurate statements of the evidence. We do not want to burden the court with a detailed refutation of their many misstatements; but some of the more glaring hyperbole and inaccuracies should certainly be answered.

They frequently state that defendant appellee issued its policies knowing of prior cancellations. This is not even a half truth. There was constructive knowledge of 2 cancellations and no knowledge whatever of 2 others.

(Specification No. 3.) Payment of small losses on assured's policies by a claims man of limited authority and without any knowledge imputable to him either actually or constructively certainly could not work a waiver of a warranty in the policy.

(Specification No. 4.) They say Carfagni made no statement about cancellations. The evidence shows his agent, Payne, did so. The assured adopted it as his statement upon retention of the policies through his agent.

(Specification No. 5.) They do not state the truth because appellee did not know of all cancellations.

(Specification No. 6.) It is not true that the Home policy was cancelled because of a "bad credit report". We shall later refer to the record, showing it was because Carfagni was a bad risk.

(Specifications Nos. 7, 8 and 9.) The issue of cancellation by the Travelers was made at the trial without objection and existed in the pleadings. (Tr. pp. 12-14, 10-11.) (Paragraph III and IV of Answer.) The evidence of these cancellations has already been pointed out.

(Specification No. 10.) Evidence of false representations by Carfagni's agent exists in abundance. The extent of appellee's knowledge is grossly exaggerated.

(Specification No. 11.) The argument that appellee issued its third policy based entirely on its own experience is absurd. The record is full of evidence that reference was made to the original schedule of declarations and that reliance was placed on Payne's assurances to Miss Hearney. There was really not any need for inquiring of Payne after the 1929 inquiry, because at that time Payne said Carfagni had not been cancelled out by any company, and certainly the appellee could rely on that as being true in May, *1931,* since appellee certainly had not cancelled Carfagni up to that time.

(Specification No. 12.) If this was error it was not harmful to appellants. However, appellants' own witness supplied the evidence about the Pacific Employers Insurance Company cancellation. (Tr. pp. 227, 230-231.)

(Specifications Nos. 13, 14, 15, 16, 17.) These will be fully answered by our references to the record in support of the findings.

(Specification No. 18.) Reliance on an order to have the car sent to Larkin Co. is of no avail. There

was no evidence as to who authorized it nor of the authority of the unnamed person in so ordering it; nor of that person's knowledge concerning a breach of warranty. The only evidence on the subject was conflicting. (Tr. pp. 105, 189.)

(Specifications Nos. 19, 20, 21, 22.) These are general specifications. No evidence is pointed out to support them. If there were such evidence, it was conflicting and the trial court resolved the conflict in favor of appellee.

(Specifications Nos. 23, 24, 25, 26, 27.) Rejection of appellant's proposed findings is complained of. The findings do not adhere to the facts. (Tr. pp. 117-118, 135-136, 149-150, 162-163, 202-203, 228-233, 217, 148, 163, 107-109, 164.) They are based in part on conflicting evidence and the trial court found the other way. Some of these proposed findings were immaterial and the one about the tender of premium was not an issue, any defect having been waived by Carfagni. (Tr. pp. 180, 182, 175, 176.)

(Specification No. 28.) This finding re the policy coverage was wholly unnecessary to the decision.

(Specification No. 29.) This specification serves to show the fallacy of their charge of estoppel. Carfagni believed he was insured with appellee all right; but what he hoped was that appellee would never find out about his previous insurance record. He was not relying on the insurance company to keep him insured regardless of cancellations. He didn't know one way or the other about the company's purported knowledge. His agent, Payne, however, had strong reason

for suspecting that appellee didn't know about the cancellations and to hope that appellee would never find out. What Carfagni and Payne were really relying on was their misrepresentation to Miss Hearney (appellee's underwriting agent) and on their own discreet silence concerning the past.

(Specification No. 30.) Appellants object to the introduction in evidence of Defendant's "Exhibit B", showing the facts of the Home Fire & Accident Insurance Company's cancellation and the reasons therefor. They do not now support this objection with any authorities, obviously because it was clearly admissible.

(Specification No. 31.) Objection was made to testimony by appellee's underwriter, Arnberger, the only man whose knowledge of prior cancellations could have any bearing on the question of waiver. Mr. Arnberger said he never saw the I. C. C. A. cards showing cancellations by the Home and the Pacific Employers. This evidence tended to defeat any supposition of actual knowledge from the mere existence of the cards in appellee's files. Therefore, it was very material to the point of waiver.

(Specifications Nos. 32, 34.) These are general specifications against the decision made as a whole.

(Specification No. 33.) Here the appellant attempts to use the memorandum opinion of the trial court as a conclusion of law. This use of the opinion is not permitted.

THERE CAN BE BUT TWO ISSUES ON THIS APPEAL; YET APPELLANTS ARGUE ON NINE ISSUES OF DISPUTED FACTS.

Although there are some thirty-four specifications of error in their brief, only the nine so-called issues are discussed by reference to authorities.

The findings, the facts, and the law are all against them and serve as a complete answer to their nine questions as to the issues. For example, No. 7 of their issues is contrary to the finding. (Evidence at pp. 117, 118 and 135.) Their issue No. 8 deals with the question of rescission. Where a policy is void because of a false warranty, the question of a right to rescind is unimportant. Rescission is not the sole remedy.

However, the sole issues before this court on an appeal of this kind are:

1. Are the findings supported by any substantial evidence?

2. Were the conclusions of the trial court correct in law under those findings?

In Section V of their brief appellants seek to inject the issue of fraud into this case. That has never been an issue. The evidence and the proof was of a misrepresentation, a concealment, and a false warranty. The false warranty is the principal ground for the trial court's decision. Proof of any one of the above circumstances would have sufficed to defeat the claim. Moreover, the question of proof was resolved in favor of the appellee by the trial court.

THE APPELLANTS' ARGUMENT IS WEAKENED BY THE CASES THEY CITE. EXCEPT FOR CASES MISCONSTRUED AND MISREAD BY APPELLANTS, THERE ARE NO ANALOGOUS FACTS CONTAINED IN ANY OF THEM.

With the findings of the trial court and the limited issues in mind, we turn to a discussion of the points made by appellants commencing on page 51 of their brief. Our remarks under this heading shall be confined to a brief criticism of the arguments advanced and of the cases used by appellants.

A. ALTHOUGH A MISREPRESENTATION WAS NOT ESSENTIAL TO SUPPORT A DEFENSE OF FALSE WARRANTY; YET THE RENEWAL POLICY WAS GRANTED ON THE STRENGTH OF A MISREPRESENTATION.

Under Section VII appellants say the policy sued on is a separate contract and unrelated to the policy of 1929. They forget, however, that the third policy was simply a renewal of the original and that it was based upon the statements and representations made by Carfagni's agent in 1929. Appellants' case of *Kentucky Vermillion Co. v. Norwich Ins. Co.,* 146 Fed. 695, is a case upon which we rely in support of our position on the question of warranties and their waiver. It does not eliminate prior representations and statements from consideration under the renewal policy.

Danvers Bank v. National Surety Co., 166 Fed. 671, merely holds (p. 673) that the insurer is not limited to the original application, but may also rely on statements made in the renewal application. Counsel misstate the ruling of the court.

basis. In the other group we have the assured telling the facts to the company's agent and the agent then construes those facts in his own way and puts down an answer that he thinks is proper, although it may not accruately translate the assured's statement. In these cases, even though the assured sees the answer that is made by the agent, he is held entitled to rely on the agent's interpretation and assurance that such an answer is the proper one under the facts. In most of these cases in both groups the question of waiver is not involved at all. Another group of cases is decidedly favorable to appellee, and the rulings were evidently misconstrued by appellants. Then there is a group of miscellaneous cases which we shall deal with separately.

The following cases to be found under Section VIII of appellants' brief deal with facts wholly dissimilar from ours:

First, because our case is primarily concerned with a breach of warranty.

Second, because under the misrepresentation phase of our case the only statement made by assured was false, whereas in the cases hereunder listed the assured told the facts to the agent and relied on the agent's correctly transcribing the information, who, without assured's knowledge, does not do so.

In many of these cases the answers were not proven false; there was not a non-waiver clause in the policy or waiver was not involved.

Menk v. Home Insurance Co., 76 Cal. 50;
Lyon v. United Moderns, 148 Cal. 470;

Schwartz v. Royal Neighbors, 12 Cal. App. 595;
Putnam v. Commonwealth Ins. Co., 4 Fed. 753;
Fireman's Fund v. Norwood, 69 Fed. 71;
American Life Ins. Co. v. Mahone, 88 U. S. 152.

The following group of cases cited by appellant under Section VIII of their brief concerns the truthful statement by assured to an agent who puts his own interpretation upon it and fills in the answer according to his interpretation.

Pacific Employer Co. v. Arenbrust, 85 Cal. App. 263, 266;
American Building Maintenance Co. v. Indemnity Ins. Co. (erroneously referred to as *California Building Maintenance Co. v. Indemnity Ins. Co.,*) 214 Cal. 608;
Parrish v. Rosebud, 140 Cal. 635;
Phoenix Ins. Co. v. Warttemberg, 79 Fed. 245;
Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. Ed. 341;
Bank etc. Co. v. Butler, 38 Fed. (2d.) 972.

The following cases cited by appellants deal with facts slightly different from those in the above two groups, and for that reason we shall discuss them separately:

In *Dunne v. Phoenix Ins. Co.,* cited on page 60 of appellants' brief, a warehouse company took out insurance on the goods without assured's knowledge. The question of title was involved, and the court declared that this question did not affect the risk. Neither assured nor his agents saw the policy and did not know what statement of title had been made therein.

In *Sam Wong v. Stuyvesant Ins. Co.* (A. Br. p. 61) there had been no representation by the plaintiff whatever, nor any application signed. No inquiry was made by the company. To top off all this, the court found that *the warranties* were true.

In *Hutchings v. Southwest Auto Ins. Co.* (A. Br. p. 61) there was no question and answer involved. There was a covenant in the policy that the car was registered at Sacramento. Contrary to counsel's statement, the evidence didn't show who had the policy. Contrary to appellants' statement on the case, there was no insertion by an agent of anything at all.

On page 62 of appellants' brief a group of cases are cited as dealing with the insertion of statements by the company agent *without consulting the assured.* This is not correct. The first of these cases, *American Building Maintenance Co. v. Indemnity Ins. Co.,* (erroneously referred to as *California Building Maintenance Co. v. Indemnity Ins. Co.,*) 214 Cal. 608, merely dealt with the construction of the terms of the policy as to whether or not it covered elevators. At page 618 the court held against the estoppel theory, saying:

> "We do not think the doctrine of estoppel is applicable. It is to be noted that the claimed estoppel is based not upon an affirmative act on the part of the plaintiff corporation but upon silence or acquiescence. There is an entire absence of knowledge on the part of the plaintiff as to the facts upon which the estoppel rests and an entire absence of any wilfulness or culpability in the silence of the plaintiff. In *Weintraub v.*

> *Weingart,* 98 Cal. App. 690, 701 (277 Pac. 752), it was held that estoppel requires knowledge on the part of the person claimed to be estopped of the facts upon which the estoppel depends, and in *Lencioni v. Fidelity Trust & Sav. Bank,* 95 Cal. App. 490, 498 (273 Pac. 103, 106), the court held, 'In estoppel, there must be something wilful and culpable in the silence which allows another to place himself in an unfavorable position on the faith or understanding of a fact which the person remaining silent can contradict.' "

In *McElroy v. British American Assurance Co.,* 94 Fed. 990 (9th Circuit) (A. Br. p. 63), the sole question was whether plaintiff had a right to have his case go to the jury. A nonsuit was reversed. Again we have a case where the plaintiff concealed nothing and the agent of the company had actual knowledge of all the facts. The company's agent was not shown to have been restricted in authority in any way. (p. 995.) On the question of possession of the policy, the court said the plaintiff was entitled to assume the agent had put in the information correctly and in accord with the information given. (p. 1000.) The provision against waiver did not restrict the powers of the agent. The court indicated parol evidence could be used to show that the policy did not contain the intention of the parties due to accident, mistake, or fraud. The parol evidence may be used to show the policy was void—not to vary its terms. The use of parol evidence was limited by the dictum of the court to explain or to show the answer given by the assured was different from that shown in the policy. That case can be no authority under the facts in our case.

McMaster v. N. Y. Life Ins. Co., 183 U. S. 25, 46 L. Ed. 64, is incorrectly briefed by appellants. The agent did not insert an erroneous warranty. He put in the application a request to date the policy the same as the application, without assured's knowledge. This had the effect of making a premium due earlier. The agent told plaintiff that the policy would be effective when the first premium was paid and assured relied on this in paying the subsequent premium. The agent told assured upon delivery of the policy that it was made out as requested, insuring for thirteen months without additional premium. This was not true, but assured relied on it and didn't read the policy. Dictum by the court was to the effect that the assured had the right to rely on the agent's representation and on the fact that the policy was in accord with his application when it left his hands. (46 L. Ed. 64.) In the end, the court construed the policy to give effect to the one month of grace provision, so that payments of the first premium made the policy nonforfeitable for thirteen months.

In *Rapides Club v. American Union Ins. Co.,* 35 Fed. (2d) 253 (A. Br. p. 65), unlike our case, the suit was to reform the policy. The plaintiff told the company agent the truth about the incumbrance on the property, but the policy was written with a mortgage forfeiture clause. The court simply followed the *McElroy* case, and said on the question of reformation, the evidence showed that the parties had intended to insure without the mortgage forfeiture clause.

Palatine Ins. Co. v. McElroy, 100 Fed. 391, is the same as *McElroy v. British etc.* in 94 Fed. 990.

Knickerbocker v. Norton, 96 U. S. 234, 24 L. Ed. 689, was a case where the home office of the insurance company had on many occasions let its agents take notes instead of cash for premiums. The company received the notes without protest. It also ratified the acts of its agents in permitting extensions of time on the notes. Also, the company let plaintiff know it would not insist on a forfeiture by taking notes and by agreeing to extend the time. No waiver was involved. The question was one of ratification and estoppel, with all the necessary elements of estoppel present.

In *Union Mutual Co. v. Wilkinson,* 80 U. S. 222, 20 L. Ed. 617, a representation was made by some person other than the assured, without assured's knowledge. The agent accepted the third party's statement of the facts. It was not, as appellants say, a question of erroneous warranties. The question was solely one of representations, and since neither assured nor his agent made any such representations, the defense fell on that point. The question of waiver was not involved. Parol evidence was allowed to show it had not been the assured's representation—permitting parol in case of accident, mistake or fraud.

In *Continental Life Ins. Co. v. Chamberlain,* 132 U. S. 304, 33 L. Ed. 341, again appears the fact that the agent assured the plaintiff that co-operative societies were not considered in the question of "other insurance". Assured told the agent of his membership in

the Society, but the agent wrote in the answer "no other". The case was decided under an Iowa Statute, making the agent an agent of the insurer and not of the insured. As usual, appellants try to make this court think that the Supreme Court has refused to give effect to the non-waiver clause by quoting such a clause from the policy in that case. On the contrary, the Supreme Court simply interpreted the answer "no other" in light of the understanding of the parties and not as a change of the policy terms.

C. APPELLANTS' AUTHORITIES ON WAIVER CANNOT BE MADE APPLICABLE HERE BY THE DEVICE OF DISTORTING THE FINDINGS.

Section IX of appellants' brief is simply a continuation of the discussion on waiver and estoppel by the company. Here we find appellants trying to distort the findings into something wholly foreign, both to the findings and to the evidence. They say "*the appellee insurance company itself*" knew of the prior cancellations. It is significant that they do not refer this court to any evidence in support of such an assertion. The findings cannot be so distorted as to divorce them entirely from the evidence. Possession of cards in its files showing at most only a *constructive* knowledge of only two cancellations is the most that can be said as to the company's knowledge.

The authorities relied upon by appellants again fall into definite groups. Under this section of their brief, we find many incorrect references to the decisions.

In the following cases the question involved was the waiver of late payment of premium by acceptance of

the premium at the home office, or ratification in the same manner or by custom.

Aetna Life v. Smith, (A. Br. p. 74);
Tennant v. Travellers Ins. Co. (A. Br. p. 78);
Mutual Reserve Fund v. Cleveland Woolen Mills, 82 Fed. 508;
Phoenix Mutual v. Doster (A. Br. p. 81);
Aetna Life v. Smith (A. Br. p. 86);
Loveland v. U. S., 18 Fed. (2d) 585.

Appellants have the temerity to suggest that Mr. Sullivan's testimony about a "custom" to issue policies without inquiry of assured concerning cancellations can overcome or displace positive testimony to the contrary in the particular instance of Carfagni's policy. What was *actually* done is the important thing. Inquiry *was* made. Even the so-called custom not to inquire wouldn't effect the case where the policy was delivered to the assured's agent, and the assured's agent said he read it and knew the warranty was there. This is obviously an effort of appellants to twist the testimony about "custom" in this case into some semblance of an analogy to cases dealing with customary acceptance of overdue permiums. The evidence in our case shows that the agents of the company were in fact "on their toes" by making inquiry from assured on the question of cancellations as soon as they saw a discrepancy between the date of purchase of the automobile and the date of application for insurance.

Again at pages 94-95, appellants indulge in gymnastics in an effort to make evidence of a custom

control what actually happened. They also try to get this court to believe a witness on a question of conflicting testimony. Mr. Sullivan tried unsuccessfully to give an absurd interpretation at the trial of the words "no exceptions". He finally broke down, however, and admitted that it meant that there had been no prior cancellations. (Tr. p. 161.)

These next cases deal with truthful answers by the assured and the agent assures him that the agent's way of answering is correct:

Hanover Fire Ins. Co. v. Dallavo, 274 Fed. 258, 261, 262;

Standard Life v. Fraser, 76 Fed. 705 (A. Br. p. 80);

Lueder's Executors v. Hartford (A. Br. p. 92);

Langdon v. Union Mutual (A. Br. p. 93).

The next group of cases concerns many different situations, and the facts are in many instances incorrectly related by appellants. We discuss these cases separately, merely to point out their individual differences.

Starting with *Aetna Life Ins. Co. v. Frierson,* 114 Fed. 56 (A. Br. p. 71), appellants again supply us with a case where the assured tells the insurance company the truth and the company issues a policy. A letter to the home office by the assured told them of his contemplated trip which would otherwise have violated the policy. The court held the letter was a part of the application, and hence the truth had been told. Appellants falsely tell us (A. Br. p. 72) that the application contained no reference to a journey.

The court distinctly said at page 61 that the question of a waiver was not involved. The home office of appellee was never involved in the case at bar.

Continental Insurance Co. v. Fortner (A. Br. p. 75) dealt with waiver of proofs of loss after a loss occurred by reason of the company's denial of liability.

In *Diebold v. Phoenix Ins. Co.,* 33 Fed. 807, there was absolutely no statement made by assured in the application as to ownership, but the application showed he did not have the title in fee. This was true, and the company contracted on that basis.

Appellants misstate the facts from *Phoenix Mutual Life Ins. Co. v. Raddin,* 120 U. S. 183, 30 L. Ed. 644. (A. Br. p. 77.) The application did not misstate the assured's habits. His habits changed after the policy was written. Nor was the question of a breach of warranty involved. The sole issue was as to the representations by the assured. Out of four questions asked in the application, the assured answered only one and he answered it truthfully. The company accepted the incomplete answer and the court held they could not later object. There was no non-waiver provision mentioned. Appellants try to mislead by saying that the court upheld a certain quoted instruction (A. Br. p. 77) on the question of waiver. Appellants neglect to tell the court that the reason the instruction was not declared erroneous was on the ground that there had been no evidence of any waiver and the instruction was, therefore, inapplicable and harmless. Whether the company had any knowledge or not was not shown.

Thomas v. Charles Baker & Co., 60 Fed. (2d) 1057, had to do merely with a recital in the policy of receipt of the premium as estopping the company to deny that fact. The quotation by appellants of the non-waiver clause in that case is mere camouflage.

Firemen's Fund Ins. Co. v. Globe Navigation Co., 236 Fed. 618, involved a marine policy. The company knew of the leaks in the ship. There was no concealment of the leaks by assured. There was not any non-waiver clause. The court held the defense of unseaworthiness came too late.

New York Life Insurance Co. v. Eggleston, 96 U. S. 572, 24 L. Ed. 841, held the company itself had to ratify the agent's acts in waiving. (p. 843.) The company failed to notify assured as to where he should pay his premium, so they couldn't rely on non-payment. There was no question of waiver under such circumstances.

The case of *Sawyer v. Equitable Accident Ins. Co.* (A. Br. pp. 92-93), involved facts inserted in the application after the applicant had signed and without his knowledge. The application was not made a part of the policy.

In *Loring v. Dutchess Ins. Co.,* 1 Cal. App. 186, the truth was told by assured and the policy was payable to two persons as their interest may appear. The sole ownership clause was, therefore, held inapplicable.

In *Breedlove v. Norwich Ins. Society,* 124 Cal. 164, full and truthful information was given the company

before the policy was issued. At page 167 the court upheld the finding that a warranty was never given.

In *Bayley v. Employers Co.,* 125 Cal. 345, no answer was made as to prior payments on accident insurance. The general agent had actual knowledge of prior payments and the assured knew he knew it. The court said the question would be different and it would have favored the company had the question been answered "none other".

The following cases cited by appellants are favorable to our position:

Appellants' case of *Wheaton v. North British Co.,* 76 Cal. 415, rules for the insurance company. That case is a good one on the question of waiver and estoppel. It likewise distinguishes certain cases relied on by appellants from cases dealing with facts like those at bar. Verdict for plaintiff was reversed. In ruling, the court said:

> "The witness Heacock testified that the plaintiff did, in fact, read the application and questions attached before signing them. If the jury believed such testimony, it was evidence tending to show that the plaintiff had knowledge of the answer valuing the insured property at eighteen hundred dollars; that he approved of the statement, and by ratification recognized Heacock as his agent in preparing the application. If he did, with knowledge of the contents of the application, sign it, he was bound by the statements contained in it."
>
> * * * * * * *
>
> "The class of cases referred to is very different from that in which the policy provides that there

can be no waiver except in writing indorsed on the policy. In the last case, the mode enters into and is a part of the power; the insured has full notice when he enters into the contract that a condition cannot be waived by an agent to whom the provision as to written indorsement relates, except in the manner in the contract provided."

"There can be no estoppel where the facts are not known, as no one can be presumed to have waived that the existence of which he has not known."

* * * * * * *

"And the facts proved must be such that an estoppel is clearly deducible from them. Estoppels are not favored. (*Franklin Co. v. Merida*, 35 Cal. 558.)"

* * * * * * *

"From the circumstances assumed in the instruction, the agent of the defendant was not bound to know as a fact that there had been a breach of the condition. He may have believed no fraud, although he accepted as true the statements contained in the reports of his subordinates; even if those reports aroused his suspicions, he may, as a prudent and reasonable man, have reserved the matter for further investigation. *He was not estopped, as having knowledge of a fact, because another fact was brought to his attention which might have excited his suspicion, or even if the fact of which he had notice ought to have put him upon inquiry.* The appropriate time for investigation as to breaches of warranty or falsity of representation is when application is made for payment of a claim, and presentation of the proofs." (Italics ours.)

St. Paul Fire and Marine Insurance Co. v. Ruddy, 299 Fed. 189. This case was very carelessly read by appellants. It holds for the insurance company. Counsel for appellants quote from the policy that it would be void "if the interest of insured be other than unconditional", but they fail to note the language "unless otherwise provided". The court found for the insurance company and said there was no waiver. Its language is particularly illuminating in support of our position on this appeal.

> "There was nothing to mislead him, or that he could complain of. It is entirely dissimilar to a situation where, after there has been a breach of warranty, a company receives a premium, knowing of such breach."
>
> * * * * * * *
>
> "Here the company, it is true, had notice of the transfer; but they did nothing to induce Ruddy to believe that the insurance would apply any differently from the provisions of the contract."
>
> * * * * * * *
>
> "It is said in argument that the law does not favor technical defenses; that policies should be construed liberally; that forfeitures are not favored—all of which may be accepted as true, but in order to avoid forfeitures courts cannot do violence to contractual obligations. The unfortunate position of Mr. Ruddy has been brought about by his own carelessness in not acquainting himself with the terms of the policy at the time he bought the property."

In *Globe Mutual Life Insurance Co. v. Wolff,* 95 U. S. 326, 24 L. Ed. 387, cited by appellants, the court

limited a waiver and estoppel to cases where fraud or injustice would be worked on the assured. The court said the assured could not conceal facts from the company and then claim a waiver. The case is decidedly in favor of our position in the case at bar. The court would not presume that an agent with knowledge of a breach has informed the company of it. On the question of non-payment of premiums, the court pointed out that the company had ratified its agent's acts in taking late premiums at the home office. The policy said an agent couldn't waive its terms, but didn't limit the *manner* of waiver. No requirement existed as to an endorsement in writing attached to the policy and signed by an officer of the company. The limit on the authority of its agents was nullified by the actual powers given them, and since there was no limit on *how* a waiver could be effected, the court said late payment of premiums was waived by acceptance of them at the home office. This amounted to a ratification. This didn't have to be in writing nor attached to the policy. The language of the decision is so definitely in our favor that we quote from pages 389 and 390, as follows:

> "But, even if the agent knew the fact of residence within the accepted period, he could not waive the forfeiture thus incurred, without authority from the Company. The policy declared that he was not authorized to waive forfeitures; and to the provision effect must be given, except so far as the subsequent acts of the Company permitted it to be disregarded. There is no evidence that the Company in any way, directly or indirectly, sanctioned a disregard of the pro-

vision with reference to any forfeitures, except such as occurred from non-payment of premiums."

* * * * * * *

"It is true that, where an agent is charged with the collection of premiums upon policies, it will be presumed that he informs the Company of any circumstances coming to his knowledge affecting its liability; and, if subsequently the premiums are received by the Company without objection, any forfeiture incurred will be presumed to be waived. But here there was no ground for any inference of this kind from the subsequent action or silence of the Company. There was no evidence of a disregard of the condition as to the residence of the assured in any previous year, and, consequently, there could be no inference of a waiver of its breach from a subsequent retention of the premium paid. This is a case where immediate enforcement of the forfeiture incurred was directed, when information was received that the condition of the policy in that respect had been broken."

* * * * * * *

"The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the conditions. To a just application of this doctrine it is essential that the Company sought to be estopped from denying the waiver claimed

> should be apprised of all the facts: of those which create the forfeiture, and of those which will necessarily influence its judgment in consenting to waive it. The holder of the policy cannot be permitted to conceal from the Company an important fact, like that of the insured being *in extremis,* and then to claim a waiver of the forfeiture created by the act which brought the insured to that condition. To permit such concealment, and yet to give to the action of the Company the same effect as though no concealment were made, would tend to sanction a fraud on the part of the policy holder, instead of protecting him against the commission of one by the Company."

The above language serves to clarify our position that appellants' cases are all distinguishable on their facts.

We are at a loss to understand counsel's reference to *Allen v. Home Insurance Company,* 133 Cal. 29, 33. (A. Br. p. 93.) The holding is not as stated by appellants. In that case the plaintiff gave the true facts to the company. He didn't know it was a bawdy house. A verdict for plaintiff was reversed. The court held that the fact that plaintiff didn't know it was a bawdy house was no excuse. The liability of the company was limited by the terms of the policy.

Appellants say at page 96 of their brief that the appellee induced Mr. Payne to believe that it would not attempt to declare a forfeiture by reason of any misrepresentation in the schedule of declarations. We fail to see how Mr. Payne was induced to believe such

a thing. Mr. Payne knew very well that four companies had cancelled because Carfagni was an undesirable risk. He hoped appellee wouldn't find that out. Why, Mr. Payne didn't rely on anything except his own false and fraudulent representation! There isn't a scrap of evidence to support any statement that Payne thought appellee was keeping Carfagni insured just because it liked him and in disregard of Carfagni's record, about which appellee knew nothing.

D. APPELLANTS CANNOT NOW FOR THE FIRST TIME RELY ON A POINT NOT MADE TO THE TRIAL COURT. SECTION 633d OF THE POLITICAL CODE IS INAPPLICABLE.

Section X of appellants' brief deals in part with the effect of Section 633d of the *California Political Code*. The argument presented under this section is that Section 633d prevents the insurance company from saying what agents can waive provisions of a policy and from saying how any waiver of policy provisions can be made by such designated agents. It is only necessary to read Section 633d of the *California Political Code* to see the fallacy of appellants' contention and to realize that the section has no such effect. We find this novel argument advanced for the first time by appellants in their brief. It was apparently dug up in a desperate effort to defeat the effect of the non-waiver provision of the policy.

Examination of the code section reveals that it simply requires foreign insurance companies to write or place its insurance policies in this State through an agent of the company *"residing in this state"* and such agent "shall countersign all such policies". Now

in our particular case G. M. Roloson was the countersigning agent on Carfagni's policy. (Tr. p. 32.) In light of our subsequent discussion, it is well to note that G. M. Roloson does not figure in any of the testimony nor in any of the evidence save and except that his name appears on the policy in question as the countersigning agent. If we assume or admit, for the sake of argument, that Roloson was a general agent by force of Section 633d and by reason of the fact that his name appears as the countersigning agent, it is impossible to see how appellants can make anything out of *that.* Appellants cite cases where a general agent acquires knowledge and this knowledge is imputed to the company despite policy limitations. There was no evidence in our case that *any* person connected with appellee had any knowledge about Carfagni's insurance history, least of all Roloson. Cases imputing the knowledge of a general agent to the company do so on the theory that the general powers given such an agent nullify or abrogate the policy provisions saying no agent's knowledge can be imputed to the company.

In addition, there is a total failure of compliance with that other provision of the policy, to which the parties agreed, as to *how* waivers of its provisions are to be made, viz., by writing signed by the president or secretary and attached to the policy. Appellants can't, and don't, argue that Section 633d affects that requirement in any way.

Before discussing their cases dealing with the powers of an agent, we wish to comment on the fact

that appellants have not cited a single California case interpreting Section 633d of the *California Political Code.* This section has been in effect ever since 1923.

The case of *Bank v. Butler,* 38 Fed. (2d) 972, dealt with a Missouri statute not at all like the California section relied on by appellants. The Missouri statute merely made a soliciting agent the insurer's agent instead of the assured's agent. We have already discussed the facts of the case as indicating a full disclosure by the assured, with the general agent putting his own interpretation on those facts. No notice of any limit on the agent's authority was brought to assured's notice.

Thelen v. Metropolitan Life Ins. Co., 2 Fed. Supp. 404, simply illustrates how the Missouri statute makes the soliciting agent a general agent, so that his powers will be commensurate with his title and unrestricted by the policy provisions. A demurrer was sustained in that case, so that the court's language on waiver was a dictum. The case does not hold, therefore, that the statute modifies any provision of the policy. Nor does it hold that the statute eliminates the need for proof of waiver in the manner specified by the policy.

In the case of *Bank of Brunson v. Aetna,* 203 Fed. 810, a South Carolina statute made the soliciting agent the agent of insurer. The court held a directed verdict was error. There was evidence of broad powers in the agent. *The court didn't think the statute itself could make a mere soliciting agent into a general agent with power to waive policy provisions.* (p. 813.) It

is apparent, also, that our opponents have again misstated the ruling of the case. There was no evidence whatever of any limitation of authority in the policy. And the court merely stated that the statute raised a rebuttable presumption of a general agency. (p. 815.)

Continental Ins. Co. v. Chamberlain (A. Br. p. 102), has already been discussed. It is now referred to by appellants in connection with the Iowa statute therein discussed. The Iowa statute, like the ones in Missouri and South Carolina, simply made a soliciting agent the insurer's agent. As far as being any authority for the point that the statute modifies nonwaiver provisions, it is not in point. The court said no waiver of policy terms was involved.

At page 103 appellants say that because Section 633d of the *California Political Code* says no policy can be issued until a local agent has countersigned it, the section makes the agent's knowledge attributable to the company regardless of the policy limitation—"by a parity of reasoning with the foregoing decisions of the Supreme Court of the United States", they say. They do not show how there is any "parity of reasoning". The statutes in the cases are not at all similar to the *California Political Code* section. Moreover the cases do not hold for the proposition stated by appellants.

The facts in *Diebold v. Phoenix Ins. Co.,* 33 Fed. 807, are not in accord with the statement in appellants' brief that the application contained a misstatement. The application had a true statement to the effect that title in fee was not held by assured.

At page 104 of appellants' brief is cited the case of *Stipcich v. Metropolitan Life Ins. Co.,* 277 U. S. 311, 72 L. Ed. 895. There the assured told the company agent that he had developed ulcers. This information was not communicated to the company. The policy said any statements to its agents should not be considered as having been made to the company unless stated in part A or B of the application. It was shown that the application was not possessed by nor available to either the assured or the agent. It was therefore made impossible to put the information in part A or B. There was no question of waiver, as the assured had done all he could in telling the company agent. The limitation in the policy on the communication of statements to the company would be given effect, said the court, so far as possible to be done. At page 900 of the opinion appears language clearly distinguishing the case from the instant case. There again was an Oregon statute making the soliciting agent insurer's agent. This was simply construed as making the solicitor the authorized agent of the company. As already stated, no question of waiver or of a power to waive was actually involved in the case.

Appellants misstate the holding in *Stillman v. Aetna Ins. Co.,* 240 Fed. 462. No waiver or change in the terms of the policy was involved. The plaintiff stated the true facts to the agent, who, under the Iowa statute, was the company's agent. The statute also required that the application be attached to the policy before the company could rely on a breach of its terms. This was not done, so the schedule of warranties was

held inadmissible because of the statutory requirement. Another vast difference between the statute there involved and the California statute was that the Iowa statute stated specifically that the agent had authority to act for the company despite the policy provisions to the contrary.

Thomas v. Chas. Baker & Co. (A. Br. pp. 106-107), has already been discussed. It dealt with a recitation in the policy that the premium had been received.

At page 108 appellants say Section 633d of the *California Political Code* gave the appellee's local agent general powers. Then they say the local agent had possession of the I. C. C. A. cards and therefore knew of two cancellations when he issued the policy to Dr. Carfagni. But they don't say just what person had possession of the cards. Roloson was the countersigning agent under Section 633d, and the evidence doesn't show that he had any cards or any knowledge whatever. The only other person charged with the final passing on risks was Arnberger, and he stated definitely that he didn't know of Carfagni's past record.

Coming now to the California cases cited by appellants on the powers of agents to waive policy provisions, we search in vain for a case among them dealing with *Political Code* Section 633d.

In *Farnum v. Phoenix Ins. Co.,* 83 Cal. 246, agents customarily extended credit or time for premium payments. This custom was known to and acquiesced in by the insurance company. There was an incompleted cancellation for non-payment of premium.

In *Kruger v. Fire & Marine Ins. Co.,* 72 Cal. 91, the assured told the agent about kerosene on the premises and the agent said such a small quantity was all right. The case is thus different from ours. It holds, however, as we contend, that renewal policies are effected by the acts of the parties under the first or original policy.

In *Mackintosh v. Agricultural Fire Ins. Co.,* 150 Cal. 440, the facts were told to the agent who then tried to cover it by endorsement on the policy, but he put an insufficient indorsement on. Premium was charged for the added risk although the policy was not properly endorsed. The case therefore involved the question of a meeting of the minds and the intention of the parties to contract under certain terms and conditions which were incompletely expressed in the policy.

Sharman v. Continental Ins. Co., 167 Cal. 117, was decided in favor of the insurance company. Appellants did not read the ruling correctly. It was held that a local agent could not waive policy terms. (p. 123.) The opinion by the California Supreme Court is interesting from our standpoint because it recognizes non-waiver provisions in policies and intimates that if authority is given only to particular agents (such as president or secretary), that only such agent can waive the policy terms. (p. 124.)

Porter v. General Accident Assurance Co., 30 Cal. App. 198, is decidedly in our favor on several points. It holds that a countersigning agent cannot waive where the policy limits the power to waive to certain

specified agents. It was likewise held that the question asked of assured was *material.*

In *Bank of Anderson v. Home Ins. Co.,* 14 Cal. App. 208, the plaintiff told the company agent about other insurance. The agent told plaintiff he would note it on the policy; but he forgot to do it. The court carefully noted there had been no concealment. The effect of the non-waiver clause was not an issue because the waiver involved did not effect the terms of the policy. The appellants in their statement on the case do not correctly interpret its ruling.

In *Raulet v. Northwestern Ins. Co.,* 157 Cal. 213, there was no written application, there were no questions and answers, no inquiry by the company, and no misrepresentation, concealment, or fraud. Plaintiff was ignorant of the forfeiture provision. But finally, it was held that the encumbrance was not a chattel mortgage within the terms of the policy.

In *Knarston v. Manhattan Life Ins. Co.,* 140 Cal. 57, late payments of premiums were waived by acceptance. No change of the terms of the policy was involved.

In *Vierra v. New York Life Ins. Co.,* 119 Cal. App. 352, plaintiff asked that the policy cover from day of application and he was assured it would. The agent also took a note instead of cash. These facts show the case inapplicable to our case.

Appellants quote from *Arnold v. American Ins. Co.,* 148 Cal. 660, at p. 110 of their brief. But that case held the complaint was fatally defective. There it was

stated that one pint of gasoline was not a substantial violation. The agent said it was all right and adjusted the loss and accepted the premium. The language quoted deals with the question of knowledge by proper officers of the company. It is to be noted that it is all dicta in light of the holding. An essential difference from our case is pointed out, too, in that it is made necessary that the company lead the assured to rely on his policy as a valid policy "notwithstanding the breach of condition of which it knows."

Appellants argue that the presence of cards in appellee's files operated as a waiver, but Carfagni didn't know the cards were there and he didn't rely on any knowledge in the company. Nor do we agree with appellants when they say the only possible defense was that a written waiver was not attached to the policy as required. The trial court found on substantial evidence that there was *no waiver either orally or in writing.*

Although we have argued to the merits of appellants' contentions on the effect of *Political Code* Section 633d, we wish to urge that it cannot here be considered for the reason that the point was not made to the trial court.

> "In an action at law, this is a court for the correction of the errors of the court below exclusively. Questions which were not presented to, or decided by, that court are not open for review here, because the trial court cannot be guilty of error in a ruling that it has never made upon an issue to which its attention was never called. Railway Co. v. Henson, 19 U. S. App. 169, 171,

> 7 C. C. A. 349, 351, and 58 Fed. 530, 532; Philip Schneider Brewing Co. v. American Ice-Mach. Co., 40 U. S. App. 382, 403, 23 C. C. A. 89, 100, and 77 Fed. 138, 149; Manufacturing Co. v. Joyce, 8 U. S. App. 309, 311, 4 C. C. A. 368, 370, and 54 Fed. 332, 333."
>
> *Board of Com'rs v. Sutliff,* 97 Fed. 270 at 275.

See also, *Board of Com'rs v. Home Savings Bank,* 200 Fed. 28 at 34.

In *Ex parte Keizo Kamiyama,* 44 Fed. (2d) 503 at 505 (9th Circuit), this court has recognized the rule by stating:

> "It is a fundamental rule in the review of judicial proceedings that a party is not heard on appeal upon questions not raised in the trial court, 3 C. J. 689, Sec. 580; Edwards v. Elliott, 21 Wall. 532, 22 L. Ed. 487; Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Wilson v. McNamee, 102 U. S. 572, 26 L. Ed. 234; Rodriguez v. Vivoni, 201 U. S. 371, 26 S. Ct. 475, 50 L. Ed. 792; Huse v. U. S., 222 U. S. 496, 32 S. Ct. 119, 56 L. Ed. 285."

E. APPELLANTS RELY ON INSUBSTANTIAL CONFLICTING EVIDENCE TO ARGUE THE QUESTION OF MISREPRESENTATION ABOUT PRIOR CANCELLATIONS.

Section XI of appellants' brief is founded upon shifting sands. Here they seek to defend the answer "no exceptions" by declaring it was the truth. They arrive at this by arguing that there was only *one* prior cancellation instead of four or five, and that the one cancellation was for a reason immaterial to the risk. Although the question of this misrepresentation by Payne is only collateral to the vital point of false

warranty, appellants are still trying to confine the defense to the former point. They even seek to dictate our stand by saying "the whole defense * * * depends on this one item." Then they try to reargue the evidence to this court, remarking about "the preponderance of the evidence."

In seeking to establish the misrepresentation as immaterial, appellants again fall into the error of ignoring the findings. There were at least four cancellations, not just one. Three companies had cancelled because the risk was undesirable. (Defendant's Exhibit A, Tr. p. 63 et seq., Tr. p. 81.) The trial court found from this evidence that the statement numbered 9 was material. In addition, the Home cancelled because Carfagni was a bad risk. (Tr. pp. 117, 118, 135, 136.) We shall also show that the statement is material as a matter of law. Appellants do not state the correct facts about the cancellations and the reasons therefor.

Appellants cite *Kleiber Co. v. International Ins. Co.,* 106 Cal. App. 709, on the question of a representation being material. There the evidence was that plaintiff's predecessors in interest had been cancelled because of their non-payment of premium. In addition to that, the statement was not made by the plaintiff, nor did he know it had been made. Even had he known of its existence, the evidence showed he did not know of any previous cancellation, although the company's agent did know of it.

In *Hawley v. Insurance Co.,* 102 Cal. 651, the cancellation was made because the company was retiring from business.

Appellants' statement of *Shawnee Life v. Watkins* (Okla., 1916), 156 Pac. 181, clearly shows the basis for that decision is upon the distinguishable fact that there was no breach of warranty, because the language of the question in the policy was ambiguous and not susceptible of the interpretation given it by the company.

A similar case is *Fidelity Mutual Life v. Miller,* 92 Fed. 63, 34 C. C. A. 211. The policy was construed so that the statement was not false. Nor did plaintiff know he had been rejected.

We have already discussed the *Raddin* case referred to at page 116 of their brief. They do not correctly analyze the decision.

Citation of cases is made dealing with life insurance applications as against accident and health rejections, and vice versa. These cases are not applicable here, where all the policies were automobile public liability policies.

Business Men's Assurance Co. v. Campbell, 32 Fed. (2d) 995, dealt with an ambiguous question. The answer was declared true under the question as construed. Application was for an accident policy. Rejection had been by a life insurance company.

In *Solez v. Zurich Ins. Co.,* 54 Fed. (2d) 523, the case was reversed for erroneous instructions. The court held that where one is a life policy and the other an accident policy, the question of rejection by one as material to the other is a question of fact. It can be seen from this that appellants have misconstrued the holding.

Guaranty Life v. Frumson (Mo. 1921), 236 S. W. 310, dealt with a withdrawal of the application by the assured himself.

Mutual Life Ins. Co. v. Ford (Texas), 130 S. W. 769, speaks for itsef. The answer made was simply incomplete and a fraternal organization was not contemplated by the question.

F. IN ARGUING ABOUT RESCISSION APPELLANTS IGNORE THE FINDINGS ON QUESTIONS OF FACT AND FAIL TO SHOW THAT THE NECESSARY ELEMENTS OF ESTOPPEL EXISTED.

In *Section XII* of appellants' brief we find an attempted argument that appellee was estopped to rescind. We shall later show by the authorities just what rights and remedies an insurance company has upon learning of a breach of waranty and a false representation. Suffice it to say, rescission was not the sole remedy. Secondly, there was no evidence sufficient to work an estoppel against the company's right to rescind. (*American Maintenance Co. v. Indemnity Co.,* 214 Cal. 608, supra.) The trial court found against appellants. The entire theory of estoppel tumbles because appellants produced no evidence showing that either Carfagni or Payne knew anything about the company's knowledge or lack of knowledge of Carfagni's past record. The evidence indicated that both Payne and Carfagni believed the company had no knowledge whatever. Therefore, this very essential element was lacking. Another element lacking was any *actual* knowledge of *all* the facts by anyone connected with the insurance company. A third element lacking was the utter failure of the plaintiffs below to show any authoritative action by some one

connected with appellee and having knowledge of the facts.

Murray v. Home Life, 90 Cal. 402, cited by appellants involved a *waiver* of non-payment of premium by acceptance of overdue payment.

We disagree with appellants' statement on page 122 of their brief that the uncontradicted evidence showed any of the facts therein referred to.

Silverberg v. Phoenix Ins. Co., 67 Cal. 36, involved a *finding* of full knowledge of all the facts. The court distinguished the case from an earlier decision on the ground that the one at bar did not involve a policy with a non-waiver provision.

In *J. Frank & Co. v. New Amsterdam Casualty Co.,* 175 Cal. 293, the insurance company sought to avoid liability on the ground that the assured was a corporation instead of an individual. The court decided there was a waiver because the company had defended the suit in which the assured had been designated a corporation, all to the knowledge of the company. The court pointed out that the non-waiver clause does not govern waivers of requirements after a loss has occurred.

Faris v. American National Co., 44 Cal. App. 48, involved a waiver by the secretary of the company. Under the non-waiver clause, the secretary was one of those given the power to waive. He asked for and collected the premium after default.

At page 124 (A. Br.) are cases already discussed by us. *Cotten v. Fidelity & Casualty Co.,* 41 Fed. 506, the

only new one there cited deals with a demand for and acceptance of the overdue premium after assured had died.

G. WHERE THERE IS A BREACH OF A WARRANTY CONTAINED IN THE POLICY, ARGUMENTS ABOUT LACK OF MISREPRESENTATION AND INCOMPLETE CONSTRUCTIVE KNOWLEDGE CANNOT BE USED TO ELIMINATE THE PLAIN PROVISION OF THE CONTRACT AGAINST ANY WAIVER OF ITS TERMS EXCEPT IN THE MANNER AND BY THE PERSONS AGREED UPON BY THE PARTIES.

Section XIII. For six pages appellants strive to "ambush" the authorities to be presented by appellee. They say any of our cases upholding non-waiver provisions are immaterial for three reasons. *First:* Because, they argue, the misrepresentation died or spent its force almost as soon as made. The findings and the evidence show that Payne's answer in 1929 was relied on by the company in 1931 and that Payne knew it would be and knew that it was in fact relied on by the company as soon as he read the 1931 policy. Moreover, the statement, being a warranty and a part of the policy, was made the assured's contract and the statement was adopted and confirmed by assured's retention of the policy. The Federal cases are not in conflict. Appellants have cited cases on facts entirely different from the ones at bar. They also misconceive the points involved. The question of consulting the assured is not important where we are dealing with a breach of warranty. Nor do appellants' cited cases fit the situation, because neither Carfagni nor Payne ever gave a true statement of all the facts to the company as was the fact in appellants' cited cases. Their

cited cases do not deal with a waiver at all, but more with an estoppel. Where the assured gives the facts and the company assures him the policy conforms, the company is estopped.

Secondly, appellants say our cited cases will be immaterial on non-waiver clauses because of the trial court's finding of constructive knowledge by the company of two out of four cancellations. Their statement that the "company itself knew of the cancellation of prior insurance" is not borne out by the evidence. Moreover, this argument fails to give effect to the other requirement of the non-waiver clause that the change of terms or waiver of them must be made in a writing attached to the policy.

Thirdly, they argue that our cases will be immaterial because the breach of the policy terms concerned a past transaction which could be waived despite the policy provision to the contrary. The answer to that is that the cases do not so limit the effect of non-waiver provisions. Another answer is that there is no evidence of any kind of a waiver in our case. The trial court found as a fact that there was no waiver of any kind, either orally or in writing. The case of *Northwestern Nat. Ins. Co. v. McFarlane,* 50 Fed. (2d) 539, is a case we cited to the trial court. We find appellants now using some of the language from that case. The language is not applicable to our facts and findings. Further quotation from the case will illustrate that it is authority for our position in this case:

> "The action is brought not upon the policy as written, but upon the verbal agreement or under-

standing between the agent of the company and the owner of the property insured at the time the written contract became effective as between them, as constituting a waiver of the written agreement, or as raising an estoppel against enforcing its provisions."

* * * * * * *

"But we think that the evidence shows that the written and oral agreements were contemporaneous and should be considered as one transaction, regardless of whether the physical possession of the policy had passed from the agent to the appellee. It is conceded that a written agreement cannot be modified or affected by a contemporaneous oral agreement between the parties, conflicting with the terms of the writing, and this is the statutory law in California."

* * * * * * *

"the Supreme Court is definitely committed to the proposition that mere knowledge by the insurance company of conditions which would constitute a breach and forfeiture therof at the time of its issuance, does not operate as a waiver of the express terms of the written policy."

* * * * * * *

"It will be observed that the policy in the case at bar does not provide for a forfeiture in the event that the building is vacant. It merely undertakes to insure the building while it is occupied and during the first ten days of any period of vacancy. The policy says nothing about a vacancy permit. It makes the obligation of the company during vacancy dependent upon a written modification of the contract subsequently agreed to and indorsed on or added to the policy. It provides that the building is not insured when vacant for

more than ten days. The effect of the verbal agreement was exactly the opposite. There was no waiver of a forfeiture, because the policy contained no provision for a forfeiture."

The case then holds as follows:

"It seems clear from the foregoing authorities that the agreement of the agent, with reference to prospective vacancies being oral, and in direct conflict with the terms of the policy, was not binding upon the company, not only for the reason that evidence of an oral agreement contemporaneous with and in contradiction of a written agreement is not admissible to vary the terms of a contract, but also because it further appears from the contract itself that the agent of the company was not authorized to amend or vary the contract, except by a writing attached thereto or endorsed thereon."

The dictum quoted by appellants says in effect that if the company pays a small loss *with knowledge* of a ten day vacancy it will be a waiver of that particular period of vacancy; but it cannot be regarded as a continuing waiver nor a waiver of a longer period of vacancy. It was really a question of coverage during a vacancy and did not involve the question of waiver of a forfeiture. Since the case holds for the insurance company the last part of the decision was not necessary. Nor is it of any use to appellants here, where there was no evidence of a waiver of any kind and the trial court so found.

H. WITH FOUR OR FIVE CANCELLATIONS ADMITTED BY APPELLANTS' OWN WITNESSES, AN ATTEMPT IS MADE TO ARGUE THAT THE FINDINGS ARE NOT SUPPORTED BY THE EVIDENCE.

Section XIV of appellants' brief argues that the evidence does not support the findings on cancellations. Here they try to inject error by use of the court's memorandum opinion. As already indicated, the opinion is no part of the findings. The point about the "American Indemnity Company" is illustrative of their fallacious reasoning. The trial court inadvertently said in its memorandum opinion something about a cancellation by the American Indemnity Company. This mistake was corrected in the findings.

Not only was there sufficient evidence of cancellations by the four companies as we have already indicated, but there was also evidence of confirmation of and acquiescence in those cancellations by Carfagni's authorized agent.

We are not here dealing with the sufficiency of a cancellation under the requirements of a particular policy. We are dealing solely with the sufficiency of the evidence to support a finding of cancellation. Under the cases hereinafter cited, there was substantial evidence of cancellations. Payne had full powers and could accept cancellation and ratify it on behalf of Carfagni.

Their cases on proof of cancellation deal with the requirements under a policy where the company cancelling is seeking to establish the fact. In our case the only question is the sufficiency of the evidence to

sustain the finding. (See *Barker v. Gould,* 122 Cal. 240 at 243, and other cases to be cited by us.)

The appellants' cases on the power of a broker to accept cancellation deal with agents "to procure". The evidence shows Payne had full powers in every particular.

In appellants' case of *White v. Ins. Co. of N. Y.,* 93 Fed. 161, the court held the broker's authority was great enough to accept cancellations and replace in other companies.

In *Adams v. The Manufacturer's Ins. Co.,* 17 Fed. 630, the court reversed the cases for a new trial to allow the company a chance to prove the broker's authority to receive notice of cancellation.

In *Magruder v. U. S.,* 32 Fed. (2d) 807, they could not interpret the language used by the assured to mean a request for cancellation.

In *Cronenwett v. Iowa Underwriters etc.,* 44 Cal. App. 571, the jury merely found there was no evidence of authority to cancel. Most of the cases cited by appellants are of this nature, where evidence was lacking on the subject of the broker's authority. Payne had full powers. (Tr. pp. 60, 82-83.)

Appellants cannot now argue on the facts. We shall later point out in detail that the record supports the findings in every particular. Payne's own testimony left no room for doubt that at least four companies cancelled and that Payne accepted and acknowledged these cancellations. He treated them as cancellations and tried to replace the risk with another company in each instance. (Tr. pp. 60-63, 81.)

The appellants have gone far afield of the issues. As we have already stated, we have only to consider whether the findings are supported by any substantial evidence. If they are, then we have to consider whether the conclusions of the trial court were correct in law under those findings. Resort cannnot be had to the memorandum opinion for the purpose of attacking either the findings or the decision.

THE MEMORANDUM OPINION OF A TRIAL COURT CANNOT BE USED BY APPELLANTS.

The findings of fact and conclusions of law stand as the last expression of the trial court upon the evidence and the law. After the memorandum opinion was filed the parties prepared findings and counter findings. The findings were settled by complete discussion of both sides before the court. The entire matter was again presented upon a motion for a new trial. Appellants cannot now seek to inject error by means of the trial court's preliminary opinion, which is no part of the findings nor of the evidence.

The court for this circuit has so expressed itself in *Pacific Sheet Metal Works v. California Canneries Co.,* 164 Fed. 980 at 984:

> "It has been distinctly held that the opinion of the court, assigning reasons for its conclusions, cannot be treated as a special finding. British Queen Mining Co. v. Baker Silver Mining Co., 139 U. S. 222, 11 Sup. Ct. 523, 35 L. ed. 147. Nor can the opinion of the trial court be considered for the purpose of helping the findings.

Saltonstall v. Birtwell, 150 U. S. 417, 14 Sup. Ct. 169, 37 L. Ed. 1128. Nor for the purpose of modifying or controlling the findings. Stone v. U. S., 164 U. S. 380, 17 Sup. Ct. 71, 41 L. Ed. 477; Townsend v. Beatrice Cemetery Ass'n, 138 Fed. 381, 70 C. C. A. 521; Kentucky Life & Accident Ins. Co. v. Hamilton, 63 Fed. 93, 11 C. C. A. 42; Hinkley v. City of Arkansas City, 69 Fed. 768, 16 C. C. A. 395."

See, also:

Isaacs v. DeHon, 11 Fed. (2d) 943.

In *Crocker v. U. S.,* 240 U. S. 74, 36 S. Ct. 245, 60 L. Ed. 533, the Supreme Court states the rule:

"In the briefs reference is made to portions of the opinion delivered in the court of claims as if they were not in accord with the findings. We do not so read the opinion, but deem it well to observe, as was done in Stone v. United States, 164 U. S. 380, 382, 383, 41 L. ed. 477, 478, 17 Sup. Ct. Rep. 71, that 'the findings of the court of claims in an action at law determine all matters of fact precisely as the verdict of a jury', and that 'we are not at liberty to refer to the opinion for the purpose of eking out, controlling, or modifying the scope of the findings'. See also Collier v. United States, 173 U. S. 79, 80, 43 L. ed. 621, 622, 19 Sup. Ct. Rep. 330; United States v. New York Indians, 173 U. S. 464, 470, 43 L. ed. 769, 771, 19 Sup. Ct. Rep. 487."

THE FINDINGS OF THE TRIAL COURT ARE CONCLUSIVE ON THIS APPEAL.

The rule of law enunciated is followed in both state and federal courts. The language used will be illuminating. There can be no place for argument on facts in an appeal of this sort.

> "Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive * * *"
>
> *Stanley v. Supervisors of Albany Co.,* 121 U. S. 535, 30 L. Ed. 1000.

In the case of *Independence Ind. Co. v. Sanderson,* 57 Fed. (2d) 125 at 129, the Circuit Court for the Ninth Circuit had this to say:

> "In cases of this character, the judgment of the trial court, a jury having been waived, has the force and effect of the verdict of a jury, and the judgment will not be reversed where there is substantial evidence upon which to base it."

The rule is clearly stated in *U. S. v. Tyrakowski,* 50 Fed. (2d) 766 at 771:

> "Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive. It matters not how convincing the argument is that upon the evidence the findings should have been different. Stanley v. Supervisors of Albany County, 121 U. S. 535, 7 S. Ct. 1234, 30 L. Ed. 1000; Dooley v. Pease, 180 U. S. 126, 21 S. Ct. 329, 45 L. Ed. 457."

In *Aetna Ins. Co. v. Licking Valley Milling Co.,* 19 Fed. (2d) 177, we find the Circuit Court using this language:

> "this court is bound to accept the fact conclusions of the trial court, so far as supported by any substantial testimony."

An interesting discussion on the subject is to be found in *Easton v. Brant,* 19 Fed. (2d) 857 (9th Cir.), where the court said:

> "On the foregoing facts, the appellant is confronted by two well-established principles of law, from which there is little or no dissent: First, the findings of the chancellor, based on testimony taken in open court, are presumptively correct and will not be disturbed on appeal, save for obvious error of law or serious mistake of fact. Savage v. Shields (C. C. A.), 293 F. 863. Second, a person who seeks to vary the terms of a written contract, or to establish a secret trust as against another, assumes a heavy burden, and must make out his case by clear and unmistakable evidence. In such cases the court is not bound to accept the uncorroborated testimony of an interested party, even though his testimony is not contradicted."

This court has held to the rule in no uncertain terms in the case of *San Fernando Copper Mining Co. v. Humphrey,* 130 Fed. 298 at 300. The court said:

> "It is assigned that the court erred in making the finding, but such a finding is not subject to revision by this court if there were any evidence upon which it could be made. Dooley v. Pease, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457; St. Louis v. Rutz, 138 U. S. 241, 11 Sup. Ct. 337, 34 L. Ed. 941; Runkle v. Burnham, 153 U. S. 225, 14 Sup. Ct. 837, 38 L. Ed. 694; McIntosh v. Price, 121 Fed. 716, 58 C. C. A. 136; Empire State M.

> &. D. Co. v. Bunker Hill & Sullivan M. & C. Co., 114 Fed. 417, 52 C. C. A. 219. The question so submitted to the court was one of fact to be decided on the evidence. It is not our province to review the evidence further than may be necessary to discover that the case is not one wherein there was no evidence to justify the finding."

The Supreme Court has recognized the doctrine in *Dooley v. Pease,* 180 U. S. 126, 45 L. Ed. 457, a leading case. We quote from that case:

> "Where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different. *Stanley v. Albany County Supers.,* 121 U. S. 547, 30 L. ed. 1002, 7 Sup. Ct. Rep. 1234.
>
> Errors alleged in the findings of the court are not subject to revision by the circuit court of appeals or by this court, if there was any evidence upon which such findings could be made. *Hathaway v. First Nat. Bank,* 134 U. S. 498, 33 L. ed. 1006, 10 Sup. Ct. Rep. 608; *St. Louis v. Rutz,* 138 U. S. 241, 34 L. ed. 946, 11 Sup. Ct. Rep. 337; *Runkle v. Burnham,* 153 U. S. 225, 38 L. ed. 697, 14 Sup. Ct. Rep. 837."

The court for the Ninth Circuit held in *Pacific Sheet Metal Works v. California Canneries Co.,* 164 Fed. 980 at 982-3 as follows:

> "this being an action at law, and before us on writ of error, the finding of the Circuit Court as to the fact, if there was any evidence upon which to base the finding, is conclusive here.

King v. Smith, 110 Fed. 95, 49 C. C. A. 46, 54 L. R. A. 708; Eureka County Bank v. Clarke, 130 Fed. 326, 64 C. C. A. 571; Dooley v. Pease, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. ed. 457; Stanley v. Supervisors, 121 U. S. 547, 7 Sup. Ct. 1234, 30 L. Ed. 1000; Runkle v. Burnham, 153 U. S. 216, 14 Sup. Ct. 837, 38 L. Ed. 694; Hathaway v. Bank, 134 U. S. 494, 10 Sup. Ct. 608, 33 L. Ed. 1004."

The rule in California is just the same. In *Barker v. Gould,* 122 Cal. 240 at 243, the court sustained a finding *based upon an opinion* of the witness.

Every inference, presumption, and fact will be sought by the Appellate Court to sustain the judgment. For instance, the finding by the trial court that appellee knew of two cancellations will not be distorted as appellant has distorted it, to mean that the Home Office officials had actual knowledge of these cancellations. The most that can be said of that finding from an examination of the evidence is that the cards of the credit association were in the company's files and that the company had *constructive* knowledge of their contents.

EVERY FINDING MADE BY THE TRIAL COURT HAS CLEAR AND UNEQUIVOCAL SUPPORT IN THE RECORD. THESE FINDINGS FROM SUBSTANTIAL EVIDENCE ARE DETERMINATIVE OF THIS APPEAL.

It is our purpose to illustrate by specific reference to the record how the findings can be supported under the rule just discussed.

Finding I has to do with the allegations in the complaint to support the right of action in the plaintiffs below. We need not refer to the record on that.

Finding II deals with appellee's insurance policy and its terms. The policy is in evidence (Tr. pp. 29-57) as part of plaintiffs' case.

Finding III: (a) Statement 9 was found to be a material warranty to the effect that no company had cancelled or refused to issue any kind of automobile insurance for the assured during the three years last past. This finding is true as a matter of law, as we shall show later.

(b) Statement 9 was found to be untrue and that said warranty was breached because,

1. The Home Accident and Home Fire Insurance Company of Little Rock, Arkansas, had cancelled as a bad risk (Tr. pp. 117, 118, 135, 136) on or about August 11, 1928, a policy previously issued to the assured on July 27, 1928. (Tr. pp. 112-113, Defendant's "Exhibit B" p. 114, pp. 130-132, pp. 133-142.)

2. The Travelers Insurance Company had cancelled as an undesirable risk on or about September 15, 1928, an automobile insurance policy it had previously issued to Fred Carfagni, assured. (Tr. p. 60 (Payne's authority to act for the assured Carfagni), Defendant's "Exhibit A" p. 63 et seq.; p. 81 (where Payne refers to "these cancellations" in Defendant's "Exhibit A" and "that there was trouble with

losses and the companies thought that the risk was not desirable").)

3. The Washington Underwriters Company cancelled as an undesirable risk on or about October 5, 1928, its policy of automobile insurance previously issued to Dr. Carfagni about September 5, 1928. (Tr. pp. 80-81, Defendant's "Exhibit A" p. 63 et seq.)

4. The Western States Insurance Company likewise cancelled on or about June 1, 1929, its automobile policy. (Defendant's "Exhibit A" p. 63 et seq., Tr. pp. 80-81.)

It is to be noted that Carfagni's agent Payne had full authority to act in all matters pertaining to Dr. Carfagni's insurance. (Tr. pp. 60, 82-83.) It is also interesting to note that these four policies which were cancelled were all placed by Payne under the same category in his ledger sheets (Defendant's "Exhibit A") as they were in his testimony. (Tr. p. 81.)

(c) It was found that on or before June 1, 1929, and prior to May 13, 1931, Fred Carfagni, in procuring the first policy from appellee, by and through his agent (Payne) falsely represented to appellee that there had been no losses or cancellations of automobile insurance by any other company and that it was in order for appellee to write its first policy of insurance. (Tr. p. 148 (showing Leo Pockwitz Co. were general agents for appellee), Tr. pp. 149-150, 162-163, 202-203).)

(d) It was found the policy of Fred Carfagni here in suit, issued May 13, 1931, was renewed and based on the information and statements in the first policy issued about June 1, 1929. (Tr. pp. 28-29, 108, 164, 211.)

Finding IV: (a) It was found that at the time appellee issued its policy of 1931 to Fred Carfagni it had knowledge of the cancellation by the Home Accident and Home Fire Insurance Company of Little Rock, Arkansas of its policy previously issued to Carfagni. The record supports this only in so far as it was a constructive knowledge. (Tr. pp. 227, 230, 234, 237.) Mr. Arnberger was the person in appellee's office charged with acceptance or rejection of risks (Tr. pp. 201-202, 212) and he had no knowledge whatever concerning prior cancellations against Carfagni. (Tr. pp. 203 and 217.) Appellants produced no evidence other than the presence of 2 cards in appellee's files showing only 2 of the cancellations.

(b) Constructive knowledge of a prior cancellation by the Pacific Employers Insurance Company was found by the court and is supported by the evidence. (Tr. pp. 226-227, 230, 232.)

(c) The court found that appellee did not have any knowledge concerning the details or particular reasons for these two prior cancellations. (Tr. pp. 203, 217, 229.)

(d) It was found that appellee did not have any knowledge whatever concerning the prior cancella-

tions by the Travelers Insurance Company, The Washington Underwriters Company, or the Western States Insurance Company. (Tr. p. 228 shows none of these companies was a member of the I. C. C. A. bureau, and hence that the appellee could not have had any cards in its files on these companies.) Transcript pages 203, 217 show the underwriting officer had no knowledge of any prior cancellations. The rest of the record is devoid of any showing of knowledge by appellee of prior cancellations.

(e) The court found that appellee's policy had a non-waiver provision. (Tr. p. 53.) Only the president or secretary of the company could waive policy provisions by an endorsement in writing attached to the policy. Knowledge possessed by any agent of the company could not be held to effect a waiver. This policy was in the possession of assured's agent and assured, Carfagni, was bound by the terms of his contract. (Cases later.)

(f) The court found that no warranty, provision or condition of the policy was ever waived or altered. (We invite a careful inspection of the entire record for the evidence supporting this finding. Nowhere in the record can be found the slightest evidence of a voluntary relinquishment of a known right by anyone connected with appellee and having authority so to do. Further support for this finding can be had from the cases giving full effect to this non-waiver provision in the policy.)

(g) It was found that no writing nor written endorsement was executed by appellee or attached to

the policy and signed by the president or secretary waiving or changing any of the warranties or provisions of the policy in question. (Plaintiff's Exhibit 1, p. 29 et seq.)

Finding V: (a) The court found that by reason of the falsity and breach of the material warranty of Declaration No. 9, the policy was void and never attached to the risks therein mentioned. (We have already referred to the record showing the breach and falsity of this warranty. The effect of this is a matter of law.)

(b) It was found that appellee advised Carfagni about June 30, 1931, that the policy was void and that it would accept no liability. (Tr. pp. 170-173, 175-176, 197.)

(c) It was found that appellee tendered and offered to restore to Carfagni the full amount of the premium paid on the policy. (Tr. pp. 175-176, 180, 182.) That Carfagni did not object to the mode, kind, or amount of the tender. (Tr. pp. 182, 170-173.)

(d) It was found that appellee did not accept or assume any liability under the policy of May 13, 1931. (Tr. pp. 174, 175-176, 170-173, 197.)

Of the conclusions of the law made by the court we shall have more to say later. We have illustrated line for line that all the findings are supported by substantial evidence in the record.

BASED UPON CORRECT FINDINGS, THE DECISION OF THE TRIAL COURT WAS SOUND UNDER ALL THE AUTHORITIES.

With the findings supported by the evidence, was the decision of the court correct in law?

A. ALL DEFENSES AVAILABLE AGAINST ASSURED WERE AVAILABLE AGAINST THE APPELLANTS.

(1) The California rule.

In interpreting Statutes of 1919, page 776, the leading California case of *Hynding v. Home Accident Insurance Co.,* 83 Cal. Dec. 196, seems to be the first case on the subject in California. That case is clear authority for the proposition that the insurance company may set up whatever defense it has on the policy as against the injured party. The case refers also to Federal cases hereafter mentioned. Following the *Hynding* case, we have the case of *Sears v. Illinois Indemnity Company,* 68 C. A. D. 957, in which the authorities are reviewed at great length and in which it is also held that any acts avoiding the policy done by the assured may be set up by the insurance company in an action against defendant by the injured person.

(2) The Federal rule.

Independently of California decisions, the United States Circuit Court of Appeals for the 9th Circuit decided that the insurance company could use the defense it had on the policy against the injured person. Such a decision appears in *Metropolitan Casualty Insurance Company v. Colthurst,* 36 Fed. (2d) 559. It would undoubtedly be the rule now that the

Hynding case has been decided by the Supreme Court of California.

Following the *Colthurst* case, we have the case of *Royal Indemnity Co. v. Morris,* 9th Circuit, 37 Fed. (2d) 90, adopting the same rule.

A similar decision was handed down in the case of *N. J. Fidelity, etc. Co. v. Love,* 43 Fed. (2d) 82, in which reference is made to the *Colthurst* and the *Royal Indemnity* cases.

(3) General rule.

Indeed it seems to be the general rule from the statement in *Sunderlin on Automobile Insurance,* page 417, paragraph 782, where it is said:

> "When the injured claimant becomes a judgment creditor of the assured, he has a direct right of action against the insurer, but provisions of the liability policy pertaining to notice of accident, or the insurer's right to defend on account thereof, and all other matters arising under the policy are likewise binding upon such judgment creditor."

B. DECLARATION NUMBER NINE "NO COMPANY HAS CANCELLED OR REFUSED TO ISSUE ANY KIND OF AUTOMOBILE INSURANCE FOR THE ASSURED DURING THE PAST THREE YEARS EXCEPT AS FOLLOWS: NO EXCEPTIONS", IS AN AFFIRMATIVE WARRANTY.

1. It is a warranty because of certain policy provisions.

Number II of the policy is as follows:

> "National Union Indemnity Company, Pittsburg, Pennsylvania, hereinafter called the Company, does hereby agree, *in consideration of* the premium herein, *the schedule of declarations and*

compliance with the provisions hereinafter mentioned; * * * to insure the assured * * *."

Under the provisions of this Part II, we have the provision "J", as follows:

> "*Declarations.* The several statements in the Declarations are hereby made a part of this policy and are warranted by the assured to be true."

2. The declaration concerning no previous cancellations is a warranty under the law.

(a) *California Code Provisions: Civil Code,* Section 2607, says:

> "A statement in a policy of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof."

In *Couch Cyc. on Insurance,* Vol. 4, paragraph 864, it is said that where the applicant warrants the statements in the application to be true and the policy recites that it is issued in consideration of the statements, agreements and warranties in the application, and it is referred to and made a part of the policy, such statements become warranties. Supporting this proposition is the case of *U. S. F. & G. v. Maxwell,* 237 S. W. 708 (Ark.).

In *Roberts v. Aetna Insurance Company,* 58 Cal. App. 83, the policy said that any false representation by the assured would render the policy void. The application made representations therein warranties and made them a part of the policy. The Court held: "When the policy refers to the application and makes

it part of the policy, any breach of the conditions or representations which are warranties voids it."

(b) The Federal cases holding such declaration to be a warranty, are:

Hubbard v. Mutual Insurance Co., 100 Fed. 719;

Home Life Insurance Co. v. Myers, 112 Fed. 846 (8th Circuit).

In *Doll v. Equitable Life,* 138 Fed. 705, it is held that a declaration concerning family health is a warranty.

See, also, the leading case of *Taylor, et al., v. American Liability Co.,* 48 Fed. Rep. (2d) page 592 at 593.

C. THE STATEMENT "NO EXCEPTIONS" WAS FALSE AND THERE WAS A BREACH OF WARRANTY.

1. Warranty confirmed by assured.

The statements in the declarations, including declaration No. 9 in the original policy, were inserted by Leo Pockwitz & Co., by and through Miss Hearney, after an inquiry to Mr. E. H. Payne, broker, and a false confirmation that the statements were true. Any misstatement of the broker would be binding upon the insured.

It is held in 32 *C. J.* 1337 (Note 1):

> "Where the misstatement in the application is placed therein by a broker acting as agent for the insured, it is binding upon insured."

It is further stated as a general rule in 32 *C. J.* 1335 (Note 80):

"Where an application contained a statement by insured that he had never been refused other insurance, it is not made the statement of the company by the fact that one of its officers, with a rubber stamp, added the words 'no exceptions' after the statement."

2. **The delivery of the policies and retention of them by the broker creates an adoption by the assured of the declarations and statements contained in the policy as the declarations and statements of the assured.**

(a) The general rule on this point has been stated in 32 *C. J.* 1337, where it has been declared that where the policy, if read, would disclose the falsity of the representation to the assured (where answers were written in by the agent for the company) "* * * it is under such circumstances the duty of the insured to discover, within a reasonable time, the untruthfulness of the representations constituting an inducement for the issuance of the policy, and, upon discovery of their untruth, he is bound to notify the company, and, if he fails to do so, the policy may be avoided in the same manner as if the false statements had originally been made with his knowledge."

New York Life v. Fletcher, 117 U. S. 519, 29 L. Ed. 834; and *Layton v. New York Life* (Cal. App.), 202 Pac. 958, are cited in support of this rule.

(b) In California, the case of *Kahn v. Royal Indemnity Company,* 39 Cal. App. 180, holds that the possession of a policy by the broker, who procured it at the instance of the insured, is as effectual as possession by the assured for the purpose of charging knowledge of statements contained in the application.

That was a case where the application had not been signed by the assured; and in *Madsen v. Maryland Casualty Co.,* 168 Cal. 204, at 206, it is held that the failure of assured to read the policy will not prevent enforcement of its provisions against him even where the application was made out by the company's agent with knowledge of the falsity of the warranty. Cases cited therein on this point were *Sharman v. Continental Insurance Co.,* 167 Cal. 117, and *Modern Woodmen v. Tevis,* 117 Fed. 369.

Akin to this subject are the following propositions:

Delivery of a policy to a person who is agent for the assured for the purpose of procuring insurance is sufficient delivery; similarly, delivery to the broker through whom the application was made, is sufficient delivery to assured.

32 *C. J.* 1126, 1127.

In the case of *Layton v. N. Y. Life,* 55 Cal. App. 202, referred to above, it was held that it was no excuse that the assured never saw his policy nor read it, when there was no excuse why he could not have done so had he desired. It is to be noted that *Judge Kerrigan* concurred in that opinion.

(c) The Federal rule will follow the rule as stated by the authorities above quoted.

See the leading cases of:

N. Y. Insurance Co. v. Fletcher, 117 U. S. 519, 529 and 531, 29 L. Ed. 834, holds that despite the fact that the answers in the application had been prepared by agents in the company, it was the duty of the assured

to read the application he had signed. It was also held that the assured could have seen it in the policy and that retention of the policy was an approval of the application and its statements. Likewise, in the case of *Home Life Insurance Co. v. Myers,* 112 Fed. 846 (8th Circuit), it was held that the assured, in accepting the policy, recognized its terms and could not repudiate it. The same doctrine was followed in *Wyss-Thalman v. Maryland Casualty Co.,* 193 Fed. 55, Circuit Court of Pennsylvania, 1910, where the court said:

> "* * * and that by the delivery of the policy to the assured he is put upon notice of the conditions therein expressed."

In *Maryland Casualty v. Eddy,* 239 Fed. 477 (6th Circuit), the case of *Lumber Underwriters v. Rife,* 237 U. S. 605, 59 L. Ed. 1140, is quoted as follows:

> "No rational theory of contract can be made that does not hold the assured to know the contents of the instrument to which he seeks to hold the other party."

D. THE GOOD FAITH OF THE ASSURED IN A QUESTION OF BREACH OF WARRANTY IS IMMATERIAL.

The leading case upon this subject was written by Judge Kerrigan during the time that he served as a distinguished member of the California District Court of Appeals. Under an indemnity bond, the court held that statements in the application as to the honesty of an employee were warranties in fact. It was found that the warranties were false. The good faith of the insured was held immaterial.

See:

Wolverine Brass Works v. Pacific Coast Casualty Co., 26 Cal. App. 183.

E. THE WARRANTY UPON PRIOR CANCELLATIONS WAS FALSE IN FACT.

From the history of cancellations outlined by the witness E. H. Payne, it is plain that warranty No. 9 was untrue, both at the time of the original policy and at the time of the renewal of policy No. 627,670, countersigned May 13, 1931, effective June 1, 1931.

It is true that the only cancellation which the witness Payne would concede was that of the Home Accident Insurance Company of Arkansas. This policy was cancelled August 15, 1928, less than three years from the date of the original policy, and also of the last policy of June 1, 1931. However, under the testimony of witness Payne, he stated that his record showed replacements, so that he further testified replacements were the same as cancellations. He explained this identity by stating that when a company elected to cancel it called him up during the year of cancellation and asked him to replace the business because they intended to cancel the policy which was then held by them. Under this explanation, the Travelers Insurance policy was issued August 13, 1928, and cancelled and replaced in another company September 15, 1928. The Western States policy was also cancelled on or about June 11, 1929.

Therefore, the falsity of the statement in the schedule of declarations is obvious when one reiterates the

history of cancellations within the three-year period of either the original policy or the renewed policy of June 1, 1931, to-wit:

	Policy Issued	Cancelled and Replaced
Home Accident Company of Arkansas	7/27/28	8/15/28
Travelers Insurance	8/13/28	9/15/28
Western States Group	10/5/28	6/11/29
The Washington Underwriters	9/5/28	10/5/28

Payne as an agent with full powers and in complete charge of assured's insurance business, had authority to receive and accept cancellations.

Northern Assur. Co. v. Standard Leather Co., 165 Fed. 602;

New Zealand v. Lason Lumber Co., 13 Fed. (2d) 374.

Holding that one may ratify an informal cancellation by taking out a policy in another company, see:

Arnfeld v. Guardian Assurance, 172 Pa. 605, 34 Atl. 580;

Hopkins v. Phoenix, 78 Ia. 344, 43 N. W. 197;

Kelsea v. Phoenix Ins. Co., 78 N. H. 422, 101 Atl. 362.

The evidence in our case shows that Payne not only accepted and ratified the cancellations by taking out policies in other companies; but he also acknowledged that he, as assured's agent, regarded them as and construed them to be cancellations. (Tr. p. 81.)

F. THE RENEWAL OF THE POLICY WAS BASED UPON ORIGINAL POLICY INFORMATION AND CONSTITUTED NO WAIVERS.

Please see:

Syndicate Insurance Co. v. Bohn, 65 Fed. 165 at 170 and 171.

That case holds that the warranty made in the original policy is reiterated on renewal and if any facts have arisen between the time of the original policy and the time of the renewal which would make the warranty false, that the warranty made in said renewal policy would relate to such facts and render said warranty false as of the time made, to-wit, upon renewal.

In *Joyce on Insurance,* Vol. 4, page 3530, paragraph 207, subdivision K, it is said:

> "Statements by assured in an application for an accident policy that he had not been disabled nor received medical or surgical attention during the past five years, are material and when attached to and made a part of the policy, are affirmative warranties, and when reaffirmed in a renewal certificate are falsified where there have been frequent consultations and attendance by physicians and experts and trips abroad, under serious physical and mental conditions, for treatment." (Citing cases.)

In Volume 3 of the same work, Section 2005, page 3358, it is said:

> "But it is held that warranties in an accident policy as to sound health and medical attendance on which the original policy is based, attach to the renewal thereof and relate to the time when

made, where no additional application is made or questions asked."

In *Maryland Casualty v. Campbell,* 255 Fed. 437, it is held that statements or declarations made in the original policy are repeated upon renewal.

The case of *Soloman v. Federal Insurance Co.,* 176 Cal. 133, holds that in the absence of a new application or new information showing a different intention, the renewal of a fire insurance policy is impliedly made on the basis that the statements in the original application or policy are still truthful, accurate and operative.

G. THE TRIAL COURT FOUND THE WARRANTY OF STATEMENT NUMBER 9 MATERIAL AS A MATTER OF FACT; BUT IT HAS ALSO BEEN DECLARED MATERIAL AS A MATTER OF LAW BY THE AUTHORITIES.

1. Rule in California.

By reason of *Civil Code,* Section 2610, the breach must be material to avoid the policy. The test of materiality of a breach of warranty is set forth in *Civil Code,* Section 2565, which says:

> "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, informing his estimate of the disadvantages of the proposed contract or in making his inquiries."

It would seem that that section makes it a question of fact as to whether or not the warranty is material. We believe, however, that it has been established in

California that the materiality is a question of law under circumstances such as exist in our case.

It has been held that the materiality of the thing warranted with relation to the risk is of no consequence, since the warranty itself is regarded as an implied stipulation that the thing warranted is material.

Soloman v. Federal Insurance Co., 176 Cal. 133;
Bayley v. Employers Liability Corporation, 6 Cal., unreported, 254, 56 Pac. 638.

In *McEwen v. New York Life Insurance Co.,* 23 Cal. App. 694 at 697 and 698, it is held that where the representations or answers in an application are in response to written questions and are themselves in writing, the materiality is one of law "* * * the parties, by putting and answering the questions, have indicated that they deemed the matter to be material". (Quoted from *May on Insurance,* Section 185.) The court then says that this rule set forth in *May* has been modified in Section 2565 and goes on to say: "Conceding that by reason of this statute the rule laid down in *May on Insurance,* Section 185, and followed by the courts in many states, is not applicable, we are nevertheless, of the opinion that under the statute the materiality of the representation was a question of law for determination of the court and not the jury."

The Supreme Court denied a petition for a hearing in the *McEwen* case, and in the second trial on appeal of the *McEwen* case in 42 Cal. App. 133, the same rule is applied and the court referred to *Hubbard Mutual*

Association, 100 Fed. 726, and *Jeffries v. Economical Insurance Co.,* 22 L. Ed. 833, where it was said:

> "It would be a violation of the legal rights of the company to take from it its acknowledged power, thus to make its opinion the standard of what is material, and to leave that point to the determination of the jury."

In *Bennett v. Northwestern Insurance Co.,* 84 Cal. App. 130, it was held that an affirmative warranty was a condition precedent and if breached the policy would never attach and that this was without regard to the materiality of the facts warranted. The court refused to pass upon Section 2611, *Civil Code,* concerning the modification of the rule, inasmuch as the policy itself expressly declared that it would be void for misrepresentation of a material fact. The court said:

> "* * * A misrepresentation is material which would affect the rate of premium or influence the insurer in accepting or rejecting the risk."

In *Slinkard v. Manchester,* 122 Cal. at 599, it was held that Section 2611 of the *Civil Code* is but a re-enactment of common law and the question of materiality or immateriality does not arise if the provision appears in the policy, for, by so including it, it is made material. The court held that it was error to admit evidence concerning the increase of risk.

In *Los Angeles Athletic Club v. Fidelity Co.,* 41 Cal. App. 439 at 446, the court said:

> "Respondent contends that this condition of the policy requiring prompt notice of the acts constituting the basis of a claim is not material to the

rights of defendant, and that under the Civil Code, Section 2611, the violation of an immaterial provision of a policy does not avoid it, unless it is so expressly declared in the policy. The contention that this expressed condition for prompt notice is not material to the contract is not sustained by respondent's authorities, and is contrary to the generally recognized construction of such requirements in insurance policies. Respondent's citation to the effect that notice is not material unless it is shown that injury has resulted from the failure to give same, in nearly every instance, deal with the implied requirements of notice under the general law of guaranty and suretyship. Here the parties expressly stipulated in their written contract for prompt and specific notice."

The court cites:

Riddlesbarger v. Hartford Insurance Co., 7 Wall. 386 at 390, 19 L. Ed. 257;

California Savings Bank v. American Surety Company, 87 Fed. 118.

The case of *Employers v. Industrial Accident,* 177 Cal. 771 at 776, bears out this rule although it is there held not a warranty and therefore the question of its materiality was a question of fact. It was held not a warranty because it was not a part of the policy.

2. The Federal rule.

The Federal rule seems to be the same as the California rule, and even in cases where the statements are considered representations, they are regarded as material under circumstances such as exist in our case.

In *Union Indemnity v. Dodd,* 21 Fed. 2d 709, it was held under a statute of Virginia which said that all statements in the application were to be construed as representations and not warranties and that breach should not bar recovery unless shown that the answer was material to the risk that the state court's interpretation of the state statute would be followed. The plaintiff had stated that he had not received indemnity for more than one accident when in fact he had received it several times. The application had been made a part of the policy. The court held:

> "Upon the question of whether the materiality of a representation was a question for the court or for the jury, the Virginia court has said 'whether a representation is made and the terms in which it is made are questions of fact for the jury, but, when proved, we are of the opinion that its materiality is a question for the court'."

The court goes on to quote from *Jeffries v. Insurance Co.,* 22 Wall. 47, and 22 L. Ed. 833:

> "But if, under any circumstances, it can produce a reply which will influence the action of the company, the question cannot be deemed immaterial."

The court then cites *Mutual Life Insurance v. Hilton-Green,* 241 U. S. 613, 60 L. Ed. 1202.

The rule is apparently a logical one and its logic is brought home by the case of *Marshall v. Scottish, etc., Insurance Co.,* 85 L. T. N. S. (Eng.) 757, where it is said:

> "It is not necessary for the insurance office to show that, if the disclosure had been made, they would not have granted the policy. They are entitled to the information in order to make up their minds. Then it is material and important."

Concerning evidence on the materiality of the warranty, we have the question in the schedule of declarations and the answer therein, and we have the statement in the policy to the effect that the policy is issued in consideration of the statement, and we have the additional provision that all of the statements in the schedule of declarations are warranted to be true. Under those circumstances and in view of the authorities above outlined the question of materiality would undoubtedly become a question of law. It would probably be unnecessary to go any further in the matter; however, it may be helpful to note the case of *Boyer v. U. S. Fidelity,* 77 C. D. 183, wherein the case of *Pennsylvania Mutual Life Insurance Company v. Mechanics Bank,* 72 Fed. 413, is quoted as follows:

> "The great weight of authority in this country, however, is against the view that an insurance expert may be asked his own opinion whether the undisclosed or misrepresented facts were material to the risk * * * The better authorities, however, seem to sustain the rule that insurance experts may testify concerning the usage of insurance companies generally in charging higher rates of premium or rejecting risks when made aware of the fact claimed to be material."

See, also, page 186 of the California case concerning the fact that a warranty excludes all argument of

reasonableness. The court also indicates that the question of materiality may be a question of fact. (See page 189.)

In *Home Life Insurance Company v. Myers,* 112 Fed. 846, 8th Circuit, an insurance policy was issued in consideration of the application and the application was made a part of the policy. In the application it was agreed by assured that the answers were warranted to be true and were offered in consideration of the contract. The assured stated that no proposition for insurance had been made in any other company nor was any pending. The court said:

> "This was a material matter about which the company might reasonably require information and upon which its action might reasonably depend. It was deemed so material by the company that it required from the insured a warranty of the truth with respect to it; and the insured, for the purpose of securing the policy, was willing to make and did make the warranty as required. This agreement, relating as it does to a matter obviously proper and material for consideration by the insurance company in determining whether it would accept the proposition for insurance on the life of the insured, would be enforcible even if it were not made the subject of special warranty; but, being so made, it comes fully within the principles announced in many cases and must be enforced."

The question as to whether there have been any previous cancellations was held material in the case of *Wyss-Thalman v. Maryland Casualty Co.,* 193 Fed. 55.

See, also, *Taylor v. American Liability Co.,* 48 Fed. (2d) 592, 6th Circuit, and in *Maryland Casualty v. Eddy,* 239 Fed. 477, 6th Circuit, it was said concerning such a statement:

> "Under this situation, there is no room to deny that the misrepresentation was not only most deliberate and intentional, but that they both knew it to be material. Such a situation presents no question of fact for the jury, and materiality of such a statement is apparent as matter of law."
>
> *Phoenix Co. v. Raddin,* 120 U. S. 183 at 189, 30 L. Ed. 644.

In *Snare v. St. Paul,* 258 Fed. 425, it is held that mere inquiry by the insurance company established the materiality.

In *Couch Cyc. of Insurance Law,* Vol. 4, page 2850, it is said:

> "Again, where the contract expressly provides that the answers to written questions are offered as an inducement to issue a policy, they are material as a matter of law, especially where they relate to facts within the knowledge of applicant and not within the knowledge of the insurer."

Citing:

> *Mutual Insurance Co. v. Leahsville,* 172 N. C. 534, 90 S. E. 574.

See, also:

> *Standard Insurance Co. v. Sale,* 121 Fed. 664.

In *Taylor v. American Liability Co.,* 48 Fed. (2d) 592, the schedules of warranty were made a part of the policy. It was said in one of these that no cancella-

tions had been made in the past three years. No exceptions. The court said:

> "It is not disputed that these representations were material to the risk and that the answers were false. The defense is that the soliciting agent made no inquiries whatever with reference to this subject-matter, but himself inserted the answers, knowing them to be false, and that the insured did not read the policy nor know of the representations which he was apparently charged with making. This defense cannot prevail." (Citing cases.)
>
> "The policy-holder is held strictly to knowledge of the contents of his policy (citing cases) and retention of it constitutes an adoption of the application and of the representations upon which such policy was issued."

It was also held that fraud of the agent would prevent the imputation of his knowledge to the insurance company.

One of the early cases on our subject is *Jeffries v. Economical Mutual Life Insurance Co.*, 22 L. Ed. 833. The policy included the application. The statements were regarded as true and in the event that they were not the policy was to be void.

The assured made the false statement in his application that no application had been made to any other company. The court held in view of the fact that the policy was made in consideration of the statements and declarations that this representation was material. In other words, it was stipulated as to all statements, not only as to important or material statements, that the untruth in any one would render the policy void.

"The statements need not come up to the degree of warranties. They need not be representations even, if this term conveys an idea of an affirmation having any technical character. 'Statements and declarations' is the expression—what the applicant states and what the applicant declares. Nothing can be more simple. If he makes any statement in the application it must be true. If he makes any declaration in the application it must be true. A faithful performance of this agreement is made an express condition to the existence of a liability on the part of the Company.

There is no place for the argument either that the false statement was not material to the risk, or that it was a positive advantage to the Company to be deceived by it."

* * * * * * *

"So material does it deem this information, that it stipulates that its liability shall depend upon the truth of the answer. The same is true of its inquiry whether the party is married or single. The Company fixes this estimate of its importance. The applicant agrees that it is thus important by accepting this test. It would be a violation of the legal rights of the Company to take from it its acknowledged power, thus to make its opinion the standard of what is material, and to leave that point to the determination of a jury. The jury may say, as the counsel here argues, that it is immaterial whether the applicant answers truly if he answers one way, viz.: that he is single, or that he has not made an application for insurance. Whether a question is material depends upon the question itself. The information

received may be immaterial. But if under any circumstances it can produce a reply which will influence the action of the Company, the question cannot be deemed immaterial."

See, also:

Subar v. N. Y. Life Insurance Co., 60 Fed. (2d) 239.

H. THE LEGAL EFFECT OF THE BREACH OF THE MATERIAL WARRANTY BY THE ASSURED.

A. A breach of warranty will avoid the policy although there is no provision to that effect in the policy. *Orient Insurance Co. v. Van Zandt-Bruce Truck Co.,* 50 Okla. 558, 151 Pac. 323. In *Allen v. Home Insurance Co.,* 133 Cal. 29, it was said:

"And if the act is done by a third person without the control of or with the knowledge or consent of the insured, the policy will be void."

And in *Equitable Life v. Keiper,* 165 Fed. 595, it was held that failure to disclose serious illness in answer to the question with a negative answer, it was held a breach of warranty and judgment was rendered for the defendant. The court held that there should have been a directed verdict for the defendant.

B. Section 2610 of the *Civil Code* says:

"The violation of a material warranty or other material provision of a policy on the part of either party thereto, entitles the other to rescind."

Section 2612 of the *Civil Code* says:

"A breach of warranty, without fraud, merely exonerates an insurer from the time that it

occurs, *or where it is broken in its inception prevents the policy from attaching to the risk.*"

Section 2580 of the *Civil Code* says:

"If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time when the representation becomes false."

Section 2583 of the *Civil Code* says:

"Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this chapter, such right may be exercised at any time previous to the commencement of an action on the contract."

In *Soloman v. Federal Insurance Co.,* 176 Cal. 133, it was held that the misstatement of the year model of an automobile and the misstatement of cost to the assured were material misrepresentations precluding recovery upon an automobile fire insurance policy, and in *Cooley's Briefs on Insurance,* page 1951, it is said:

"In view of the general principle that the materiality of the fact is wholly unessential in the case of a warranty, it is readily deduced that where there is a breach of warranty the policy is avoided, though the statement on which the breach is predicated is in no way material to the risk."

The case of *Peterson v. Manhattan Life Insurance* Co., 115 Ill. App. 421, question 68 of the application, was as follows:

"Have you ever been declined or postponed by any company?"

This question was answered "No." The court said:

> "That answer was untrue. Even if it were not a warranty but merely a representation, it was material, and if it had been answered truly would probably have lead to such an investigation as would have caused defendant to reject this application."

The court held that the defendant was not liable because of the breach of warranty.

In *Shamrock Towing v. American Insurance Co.,* 9 Fed. 2d 57 (2nd Circuit), libel dismissed for failure to comply with a promissory warranty. The court held that a warranty in a contract of insurance must be literally complied with and the questions of materiality or immateriality do not enter into it.

In *General Accident v. Industrial Accident Commission,* 196 Cal. 179, it was held that rescission was not the only remedy and that the insurer might wait and set up the fraudulent concealment as a defense to the action on the policy.

In *Georgia Casualty Co. v. Boyd,* 34 Fed. (2d) 116 (9th Circuit), it was held that under 2580 of the California Civil Code an insurance company could rescind for a false statement of the assured in the schedule whether it was a warranty or a mere representation, and that the rescission would be effective against third parties whose rights may be affected.

I. RULES OF EVIDENCE AND THE POLICY PROVISIONS PREVENT WAIVER OF BREACH OF WARRANTY.

(1) There is a non-waiver provision contained in Part II, Provision I, as follows:

> "No provision or condition of this policy shall be waived or altered, except by written endorsement attached hereto and signed by the president or secretary; nor shall knowledge possessed by any agent, or by any other person, be held to effect a waiver of or a change in any part of this contract. No person, firm or corporation shall be deemed an agent of the company unless such person, firm or corporation is authorized in writing as such agent by the president or secretary."

It is to be noted that this provision not only requires written indorsement signed by the president or secretary to be attached to the policy before there can be a waiver, but it also limits the power of its agents or any other persons to effect a waiver by reason of knowledge and also limits the power of any person to act as agent unless duly authorized in writing by the president and secretary.

Even where such a provision does not exist in a policy, there must be actual notice or knowledge of all the facts before a waiver or an estoppel will be worked.

In 32 *C. J.* 1322 this phase of the rule is stated as follows:

> "The principles of constructive notice which obtain as to alleged bona fide purchasers of real estate or negotiable instruments do not apply to the full extent in negotiations between the ap-

plicant and the company, since the company may rely on the presumption that insured has stated all the material facts and as a rule is not bound to make inquiries."

In a case involving a general agent of the insurance company, it has been held that the notice or knowledge necessary to work a waiver or estoppel must be actual.

Hare and Chase v. National Surety, 49 Fed. (2d) 447, 458.

In *Satterfield v. Malone,* 35 Fed. 445, it was held that constructive notice was insufficient and mere rumor was not enough to put the insurance company on inquiry.

See, also:

Cameron v. Royal Neighbors, 163 N. W. 902 (Mich.).

In *Landers v. Cooper,* 115 N. Y. 279, 22 N. E. 212, it was held that the mere fact that an agent was put on inquiry or might by diligence have ascertained the truth, was not sufficient and that it was not the agent's duty to ascertain about prior insurance. The court held that the plaintiff was bound to show that the agent, as a matter of fact, knew about prior insurance. The evidence showed that the agent had made a mistake of the facts and no actual knowledge was shown.

The general rule is stated in *Cooley's Briefs on Insurance,* Vol. 3, p. 2547, as follows:

"If an insurance company is to be held to have waived matters vitiating a policy, it or its

> agents must have actual notice or knowledge of such matters. Constructive notice is not sufficient."

To the same effect see page 2523, *Cooley on Insurance,* and at *2517* it is said that mere opportunity to make an examination or ascertain the facts will not charge the insurance company with knowledge.

A waiver is an *intentional* relinquishment of a *known* right. *Bank v. Maxwell,* 123 Cal. 36.

In *Hackett v. Supreme Council,* 60 N. Y. S. 806, the following headnote is borne out by the opinion:

> "The fact that a record of previous rejections is kept does not estop the insurer to take advantage of the misrepresentation, its contents or the former rejection of applicant not being known to the officers from whom the insurance was obtained."

The court also said that the plaintiff must show that the fact of previous rejection was "actually known to those officers or agents of the defendant from whom the insurance was obtained". This case was affirmed in 168 N. Y. 588, 60 N. E. 1112.

In *Desmond v. Supreme Council,* 64 N. Y. S. 406, the *Hackett* case is followed. In this case rejection had been in the same order by its medical examiner, who kept records of his rejections, and in *Orient Insurance Co. v. Williamson,* 25 S. E. 560, 98 Ga. 464, the policy was to be void if plaintiff's interest in the property was not truly stated. The plaintiff alleges that the defendants had notice, for a deed showing

the correct state of the title was on record. Plaintiff contends therefore that the misrepresentation was waived. The court held:

> "* * * but the doctrine of constructive notice (of the prior conveyance) does not apply as between it (insurance company) and the person to whom it issued this policy. It was entitled to rely upon the representations of the insured, and was not chargeable with knowledge of what was in the records."

We have already quoted at length from *Northwestern National Ins. Co. v. McFarlane,* 50 Fed. (2d) 539, holding there must be complete knowledge of all facts. This doctrine is followed in the following cases.

Christian & Brough v. St. Paul etc., 5 Fed. (2d) 489 at 490; *Thompson v. Insurance Co.,* 104 U. S. 252, 26 L. Ed. 765; *N. Y. Life v. Goerlich,* 11 Fed. (2d) 838. To the same effect was *Clements v. German Insurance Co.,* 153 Fed. 237, where the court allowed reformation of the policy as far as representations on the daily were concerned with reference to other policies known to the insurance company, but held that there was no waiver as to the policies not reported to the company. The court said:

> "As to this insurance, the court cannot find that there was any contract between the company and the insured that the policy issued should be valid notwithstanding that insurance. An additional insurance of $4,000 was a very material matter for the insurance company to know, in view of the fact that there was a large insurance

upon the property outside of the policy about to be issued. And as, under the terms of the policy, the agent had no power to waive any condition therein, and no condition could be waived without an indorsement in writing upon the policy itself, the court cannot find that the insurance company agreed that the policy in question should be valid, notwithstanding any amount of insurance that might be upon the property at the time of its issuance. This would not be giving the officers of the company credit for ordinary business sense, and would be in contradiction of the facts in the case. If we concede that Bolster did present to the agent of the company a full list of all insurance, still the agent could not bind the company, except by performing his duties according to the provisions of the policy; and, as he did not report to the company all of the insurance, it cannot be said that the insurance company made any contract with the insured that the policy issued should be valid regardless of the amount of insurance then on the property."

It can be seen from the foregoing quotation that the question of knowledge, actual or constructive, becomes immaterial where, as in our case, the policy contains a non-waiver provision known to the assured.

(2) The Federal courts give effect to non-waiver provisions. The limitations in the policy are binding on the parties.

First of all, notice of such limitations are imputed to the assured. In *Wyss-Thalman v. Maryland Casualty Co.,* 193 Fed. 55, the court said:

"Many cases could be cited to show that the warranties in the case at bar were material; that

> the provisions that no agent should have power to waive the provisions of the policy, except by writing endorsed thereon, are valid and enforcible, and that by the delivery of the policy to the assured he is put upon notice of the conditions therein expressed."

Again, in *Taylor v. American Liability Company,* 48 Fed. (2d) 592, the court said with reference to this subject where the assured alleged he did not read the policy nor know of the representations:

> "This defense cannot prevail (citing cases). The policy holder is held strictly to knowledge of the contents of his policy (citing cases), and retention of it constitutes an adoption of the application and of the representations upon which such policy was issued."

In *Maryland Casualty v. Eddy,* 239 Fed. 477, the court said:

> "No rational theory of contract can be made that does not hold the assured to know the contents of the instrument to which he seeks to hold the other party."

In *Northwestern National Insurance Co. v. McFarlane,* 50 Fed. (2d) 539, Ninth Circuit, Justice Wilbur quotes from *Lumber Underwriters v. Rife,* 237 U. S. 605:

> "No rational theory of contract can be made that does not hold the assured to know the contents of the instruments to which he seeks to hold the other party. The assured also knows better than the insurers the condition of his premises,

> even if the insurers have been notified of the facts."

The court indicates that the assured might get reformation in equity, but says:

> "What he cannot do is to take a policy without reading it, and then, when he comes to sue at law upon the instrument, ask to have it enforced otherwise than according to its terms."

We again refer to *Wyss-Thalman v. Maryland Casualty Company,* 193 Fed. 55. In that case a directed verdict was granted for the defendant and a new trial was denied. The policy was issued in consideration of the statements in the schedule of warranties. The policy also said that no agent had authority to change the policy or to waive any of its provisions and that notice to the agent or any other person would not affect the waiver or change of the policy and that no change or waiver would be valid unless by written endorsement by president or secretary, and that no person could act as agent unless duly authorized in writing. It also stated that all warranties made by the assured upon acceptance of the policy were true. The schedule of warranties appeared on the face of the policy. Among the statements in the application was one to the effect that no application had ever been made for insurance nor had any ever been declined or cancelled. To this was answered, "No exceptions". It was also stated that the assured had never received indemnity for accident nor had he ever applied for accident or health insurance. All of these were proved untrue. The

plaintiff sought to show that the answers had been made by an insurance broker and not by assured and that they had been inserted without assured's knowledge or consent that they were filled in by the broker in the presence of the soliciting agent of the company and in the absence of assured. The court sustained an objection to the admissibility of this evidence for the reason that it would change the terms of the contract sued on and it was held further that it was not necessary to consider whether or not the company ever waived any of the privileges of the policy, because the ground of plaintiff's action is not waiver. The court said that the contract as it was written was affirmed by the pleadings and no question of waiver was involved. The court said that whether or not any accident insurance company had cancelled any policy of assured's was a material question. It also appeared from the same that the so-called soliciting agent prepared the policy, countersigned it and delivered it to the broker. The court said:

> "Many cases could be cited to show that the warranties in the case at bar were material; that the provisions that no agent should have power to waive the provisions of the policy, except by writing endorsed thereon, are valid and enforcible * * *"

In *Maryland Casualty v. Eddy,* 239 Fed. 477, a policy was issued in consideration of the statements in the application and the statements were made a part of the policy. The policy contained no express provisions as to the effect upon the company's liability in case any statements in the application were false,

nor did the policy declare in so many words that the statements were warranties. The assured stated that no accident policy had been cancelled. This was false. Plaintiff knew this to be false and talked with the defendant's agent concerning it. The application was made for the purpose of getting insurance to replace that which had been cancelled. The court said:

> "Under this situation, there is no room to deny that the misrepresentation was not only most deliberate and intentional, but that they both knew is to be material. Such a situation presents no question of fact for the jury, the materiality of such a statement is apparent as a matter of law. * * * It is clear to us that no reasonable man could think that the deceit practiced upon this company was unintentional or in any way excusable; but we are satisfied that upon these facts plaintiff cannot recover. Aetna Co. v. Moore, 231 U. S. 543, 58 L. Ed. 356; *Mutual Company v. Hilton,* 241 U. S. 613, at 622; 60 L. Ed. 1202; *Mutual Company v. Powell,* 217 Fed. 565 at 568."

The court went on to say at pages 481-482:

> "It is contended here, as in the Aetna case, that the company is estopped by the knowledge of the agent, and the same cases are cited as were cited there. We answer here, as we answered there, that the terms of the policy constituted the contract of the parties and precluded a variation of them by the agent."

In *Fischer v. London & L. Fire Insurance Co.,* 83 Fed. 807, a policy declared it would be void if gasoline were kept on the premises, usage, etc. to the contrary notwithstanding. It also said that no agent or officer,

etc. could waive any provision except as agreed and endorsed upon the policy. Gasoline was kept in violation of this. Plaintiff set up estoppel by knowledge and conduct, alleging a general custom known to the general agent and to a board of underwriters of which the insurance company was a member, the board being formed for the purpose of supervising fire insurance rates, risks, etc., and the board inspected the premises as agents for the insurance company. The question involved was stated by the court as follows:

> "There is no allegation here that the use of gasoline was the cause of the fire, or in any way brought it about; so that the simple question presented is whether the knowledge of the general agent of the fact of the assured using gasoline in the manner set out, and the further fact that the Board of Underwriters of Louisville, of which the defendant company was a member, had knowledge of the fact that the assured used, on the premises, gasoline as described, both before and after the issuing of the policy, is sufficient to make an estoppel or a waiver."

The court held that the knowledge of the general agent was of no effect because of the non-waiver clause of the policy and that the same rule applied with reference to knowledge by the Board of Underwriters.

The following cases have given effect to non-waiver provisions of policy:

Schwab v. Brotherhood, 305 Mo. 148, 264 S. W. 690, where it was held that the intent to waive must be clear or else some element of estoppel must be shown.

In *Conner v. Connecticut Fire Insurance Co.,* 291 Fed. 105, a demurrer to the plea of estoppel and waiver was sustained. The policy there had a non-waiver clause.

Similarly, in *Stipcich v. Metropolitan Life,* 8 Fed. (2d) 285, a non-waiver clause was recognized.

See, also, *Hartford v. Small,* 66 Fed. 490, where a non-waiver clause was given effect in the case of knowledge by a local agent. A good case on this subject is *Christian & Brough Co. v. St. Paul Insurance Co.,* 5 Fed. (2d) 489 at 490, holding a non-waiver provision is binding and excluding proof of waiver or proof of custom of the agents. Citing *Penman v. St. Paul Insurance Co.,* 216 U. S. 309, 54 L. Ed. 493.

The case of *Fountain & Herrington v. Mutual Life Insurance Co.,* 55 Fed. (2d) 120, says at 123:

> "The plaintiff does not seriously controvert the position that the representations were material. Its position is that the knowledge of the local agent of the truth as to the matters inquired about was imputable to the company, and that the issuance of the policy in the face of his knowledge was a waiver of the right to avoid the policy on account of the falsity of the representations. The answer to this is that notice to an agent is notice to the principal only as to matters lying within the scope of the agent's authority; and the agent here had no authority to pass upon risks, accept any representations or information not contained in the application, or waive forfeitures. And not only was the authority of the local agent thus limited; but both in the application and in the policy as issued the insured agreed upon such

> limitation. It is well settled that the courts of the United States will recognize and enforce such limitations upon the power of the agent thus brought to the attention of the insured, and that knowledge on the part of the agent in such case will not be imputed to the company or result in a waiver of conditions contained in the policy."

In California, the *Civil Code* sections have a bearing upon the notice to or knowledge of an agent:

Civil Code, Section 2306, says an agent has no authority to defraud the principal.

Civil Code, Section 2315, says the agent has such authority as the principal actually or ostensibly confers upon him.

Civil Code, Section 2318, is as follows:

> "Every agent has actually such authority as is defined by this title, unless specially deprived thereof by his principal, and has even then such authority ostensibly, except as to persons who have actual or constructive notice of the restriction upon his authority."

(3) The Federal parol evidence rule prevents a waiver of policy provisions.

The Federal cases have held that no evidence will be allowed or be admitted to show a waiver of breach of warranty where the policy contains a non-waiver provision, as in our case, upon the theory that a written contract cannot be varied by parol evidence.

The leading case on this subject is *Northern Assurance Co. v. Grandview Building Association,* 183 U. S. 308, 46 L. Ed. 213. There the policy contained a non-

waiver clause unless endorsed on the policy in writing, and it was declared that the policy would be void if there was other insurance. The plaintiff had other insurance and told the defendant's record agent of that fact, and the agent had authority to sign and issue policies and to accept risks and, in fact, accepted the risk knowing of concurrent insurance. The court held that the plaintiff could not recover and that a written contract could not be varied by parol. The case gives a comprehensive review of the authorities and contains considerable material for the point involved.

In the case of *Mutual Insurance Co. v. Hilton Green,* 241 U. S. 614, 60 L. Ed. 1202, is based upon the same principle, holding that a representation known to be false will relieve the insurance company even though the soliciting agent and medical examiner had knowledge of the misrepresentations.

We wish to call attention to the case of *U. S. F. G. v. Leong Dung Dye,* 52 Fed. (2d) 567 (9th Circuit). That was a case where the court said that fraud and deceit were the sole issues and the question whether the insured had received notice of prior cancellation was one for the jury. There is a strong dissent in the case by Wilbur, J. on the theory that you cannot vary the contract by parol. We also call attention to *Northern Life v. King,* 53 Fed. (2d) at 617, saying that the narrow issue in the *Leong Dung Dye* case was whether the assured had received notice of rejection. We feel, therefore, that the case can be discarded.

In the case of *Fidelity Phenix Fire v. Queen City Bus,* 3 Fed. (2d) 784, the non-waiver clause is recog-

nized and it is held that evidence of waiver is not competent to vary the contract.

In *Maryland Casualty v. Campbell,* 255 Fed. 437, it was held that the insurer could not be deemed to have waived a warranty in the application concerning the insured's not having received medical attention within two years, merely because its agent knew the statement to be untrue, where the policy expressly withheld such authority from the agent and provided that no waiver should be valid unless endorsed thereon and signed by the president or secretary. The writ to the U. S. Supreme Court was denied in 250 U. S. 658, 63 L. Ed. 1193.

As we have already noted, the general rule announced by the above cases has been recognized in *Northwestern National Insurance Co. v. McFarlane,* 50 Fed. (2d) 539 (9th Circuit).

See, also, *New York Life Insurance Co. v. Goerlich,* 11 Fed. (2d) 838, which holds that there is no presumption that the agent accepting the application with knowledge of insured's rejection by another company communicated the information to the insurer. The court also holds false representations concerning prior application and rejections were material as a matter of law.

Also, please see *Penman v. St. Paul F. & M. Insurance Co.,* 216 U. S. 309, 54 L. Ed. 493, which holds that a condition avoiding the policy if blasting powder is kept on the premises is not waived because the insurer's agent knew of the breach of the condition by reason of a custom among miners to keep blasting

powder in their homes and that this was so even though more than the usual rate was charged. The court based its holding upon the fact that the policy guards against any acts of waiver or change of its conditions by providing that such waiver or change must be written upon or attached to the policy.

J. THE QUESTION OF WAIVER MATTER OF GENERAL JURISPRUDENCE AND STATE LAW DOES NOT CONTROL.

There are two excellent cases upon this subject. Please see:

(a) *Hartford Fire Insurance Co. v. Nance, et al.,* 12 Federal (2d) 575 at 576. In this case there was a question as to whether or not an insurance contract could be varied by parol evidence for the purpose of asserting estoppel to insurer's defense that policy was vitiated where insured's interest was other than unconditional, it being shown that soliciting agent was informed of such condition: Held, that the question was a matter of general jurisprudence and the State law did not control.

(b) *Home Insurance Co. of N. Y. v. Scott,* 46 Fed. (2d) 10. This case held further provisions of fire policies prohibiting encumbrances were waived because local agent knew of chattel mortgage, is a question of general jurisprudence and not State law.

See also:

Aetna Life v. Moore, 231 U. S. 543, 58 L. Ed. 356;

Gill v. Mutual Life, 63 Fed. (2d) 967.

Therefore, in view of the Federal rule as applied in the leading cases of *Northern Assurance Co. of London*

v. Grandview Building Association, 183 U. S. 213 at 234-235, and *Lumber Underwriters v. Rife,* 237 U. S. 605, the admission of parol evidence to vary the terms of a prior written contract upon the theory of an estoppel is an evasion of the true rule. The contract of insurance contained the usual provisions with respect to waivers commonly known as the non-waiver clause. This is a reasonable provision and one enforcible in the Federal courts. This is a valid contract and has so been held by this court, applicable alike to waivers claimed by the insured to have been made by the principal or company as well as to waivers claimed to have been made by an agent. The minds of the parties have met upon the terms of the contract and their rights must be governed accordingly. They must be bound by all of its terms, not by parts they choose to select for controversy. See leading case, Ninth Circuit, *Kentucky Vermillion Min. & Concentrating Co. v. Norwich Union Fire Insurance Society,* 146 Fed. 695 at 700-71. It is, of course, elementary that everyone embodies the statute of a State in his contracts. The effect of this proposition is that all of the provisions upon warranties in California become a part of the insurance contract and an express condition therein.

Please see:

Farnsworth v. Hagelin, 300 Fed. 993 at 995, 9th Circuit.

CONCLUSION.

The findings by the trial court play the most important part in this appeal. Those findings were based upon substantial evidence, in some instances conflicting, in many instances not controverted.

Second in importance is the selection of authorities applicable to the facts as found by the trial courts. Appellants seize upon evidence which *they* believed true and which the court did not believe true. They then seek to apply their cited cases to a set of facts wholly foreign to the issues on this appeal. We are concerned only with the facts found by the trial court —which are amply supported by the evidence.

The policy contained a warranty of a material fact. The assured, through his authorized agent, knew of the existence of that warranty in the policy. It was the assured's warranty. In addition, assured's agent made an affirmative representation that the warranty as written was true. This was made by assured's agent knowing it to be false; knowing of and personally acknowledging at least four prior cancellations. The policy contained a non-waiver clause, specifying the persons through whom and the manner in which policy provisions could be altered or waived. The persons through whom notice or knowledge could be imputed to the company were also limited by the policy. Its terms were agreed upon by the assured. Appellants stand in the shoes of assured.

With these facts, what authorities determine the question? The cases determinative of the soundness of the trial court's decision have already been reviewed

by us. They are cases dealing with warranties in policies—declaring that the mere falsity of the warranty avoids the obligation. They are cases dealing specifically with the effect of non-waiver provisions—giving full effect to the agreement of the parties on that subject. They are cases dealing with a misrepresentation in fact made by the assured to an agent having no actual knowledge upon the subject or having no authority to waive the breach of a warranty contained in the policy.

Clearly this is not a case in which fraud is an issue. In simplified form it is a case involving these questions:

1. Was there a warranty in the policy?
2. Was the warranty material?
3. Was it breached?
4. Was the breach of the material warrranty waived in the manner agreed upon by the parties?
5. Could there be a waiver in any other manner?
6. Was there a waiver in any form?

Secondary issues are:

1. Was there a misrepresentation by assured's authorized agent?
2. Was the misrepresentation relied upon by appellee?

The findings themselves resolve all these questions in favor of the appellee insurance company. The authorities give full support to the court's decision.

Under the findings and under the law the judgment of the trial court should be affirmed in every particular. There can be no conflict among the authorities on the rule of law to be applied to the circumstances found in this case.

Dated, San Francisco,
October 19, 1934.

Respectfully submitted,
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